Supreme Court, U.S.
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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

DR. DONALD AUSTIN,
Petitioner,

v.

HARPER HOSPITAL,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI
With APPENDIX

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QUESTIONS PRESENTED

I. Where a state university and private hospital are joint incorporators and operators of a medical facility, operate the medical facility for their mutual benefit pursuant to a master affiliation agreement, each participate in the day to day management of the facility, appoint individuals to act in dual capacities, and where for their mutual economic benefit they create and disseminate a publication to the public. paid for by the private hospital, inflicting First Amendment damages upon the plaintiff, should the private hospital be considered a state actor under *Burton v. Wilmington*, and its progeny for purposes of 42 U.S.C. 1983 liability?

II. Is it this Court's intention in its rulings since *Burton* and acknowledging a trial court's obligations and powers under F.R.Civ.P. 56, to take away from a jury the issue of whether a symbiotic relationship exists?

III. Where through discovery Plaintiff compels the state/private Defendants to no longer falsely represent the academic credentials of a physician to the public and private sectors, and where criticism of the practice of misrepresentation was one of the reasons for the retaliation incurred by Plaintiff, has Plaintiff's lawsuit become a catalyst for change, accomplishing one of the goals of the lawsuit and is Plaintiff a prevailing party, entitling Plaintiff to attorney fees under 42 U.S.C. 1988?

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

All parties are listed in the caption.

Harper Hospital ("Harper") has neither parent nor subsidiary companies.

Wayne State University ("WSU") is a state university established through the Michigan Constitution, Article 8, Section 5; MCL 390.641.

Harper Hospital, along with several other hospitals in an agreement with Wayne State University, formed the Detroit Medical Center/WSU Health System. The name was subsequently changed to the Detroit Medical Center ("DMC").

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Petitioner Dr. Donald Austin respectfully prays that a Writ of Certiorari issue to review a final judgment and order of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The decision of the Court of Appeals for the Sixth Circuit was filed on October 13, 1999, and was not recommended for publication (Appendix A). The trial court's unpublished opinion and orders granting Defendants Harper Hospital and Dr. Diaz summary judgment was filed on July 3, 1996 (Appendix B), and denying attorneys fees was filed on March 31, 1998 (Appendix C).

JURISDICTION

This case arises from the lower courts' refusal to follow this Court's decisions in *Burton v. Wilmington Parking Auth,* 365 US 715 (1961) and *Adicke v. S H Kress & Co,* 398 US 144 (1970), and allow his claim to be submitted to jury resolution. Petitioner, Dr. Donald Austin, a neurosurgeon and member of both the Harper Hospital Neurosurgery Department and a faculty member with the WSU medical school, alleged that the private hospital be considered a state actor for purposes of 42 U.S.C. § 1983 liability under the *Burton* symbiotic relationship doctrine, as a result of a series of retaliatory actions inflicted upon him in derogation of his First Amendment right of free speech in testifying on behalf of plaintiffs in medical malpractice cases against his department head Dr. Diaz's wishes, and for criticizing the qualifications of Dr. Zamorano, a physician who, through joint interlocking economic relationships, generates substantial public and private monies for Defendants Diaz, Harper and WSU.

The petition presents the issue as to whether there is any continuing vitality to the *Burton* symbiotic relationship/nexus doctrine, as refined by this Court, to impose 42 U.S.C. § 1983 liability on the private entity, Harper, for violation of Petitioner's First Amendment rights where facts established that the private and public entity have so far entwined and interlocked themselves and delegated authority to one individual to achieve mutual economic benefits, that the aggrieved actions of Harper, through Diaz, "are fairly attributable to the state."

Further, the petition raises the issue as to whether it is this Court's intention through its rulings from *Burton* and its progeny, and acknowledging a trial court's obligations and power under F.R.Civ.P. 56, to always decide as a mater of law whether a symbiotic relationship exists rather then submit the issue to a jury.

This petition finally presents the issue as to whether Petitioner is a prevailing party under 42 U.S.C. § 1988(b) and the catalyst for change doctrine, *Hensley v. Eckerhart*, 461 US 424 (1983), and its progeny, where through discovery Plaintiff compels both the state and private Defendants to no longer falsely represent the academic credentials of a physician to the public, and where criticism of the practice of misrepresentation was one of the reasons for the retaliation incurred by Plaintiff and one of the goals of the lawsuit. The District Court rejected the argument on the ground that the lawsuit did not specifically request any relief to WSU or Harper's ability to represent Dr. Zamorano as holding a Ph.D.

The Sixth Circuit, in its written opinion filed October 13, 1999, found that there was insufficient evidence to establish Harper as a state actor under the nexus or symbiotic

relationship test and also affirmed the denial of attorney fees.

This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The First, Seventh and Fourteenth Amendments to the United States Constitution, along with pertinent Federal and State statutes and rules are reproduced in Appendices.

STATEMENT OF THE CASE

Petitioner's claims against Harper are predicated on the grounds that Harper, by and through Dr. Diaz, was acting as a state actor for purposes of liability under 42 U.S.C. § 1983, and that Petitioner's speech, testifying in malpractice cases and criticizing the qualifications of a physician, are matters of public concern and therefore protected under the First Amendment.

Wayne State University ("WSU") is a state university established through the Michigan Constitution and statutory authorization. Michigan Constitution, Article 8, Sec. 5; MCL 390.641). Harper Hospital ("Harper") is a private hospital in Detroit, and a member of the Detroit Medical Center Group of hospitals. Prior to 1972, the individual hospitals, in what eventually became the Detroit Medical Center, had separate agreements wherein the hospitals were the teaching facilities for the WSU. In 1980 and again in 1985, the hospitals entered into a Master Affiliation Agreement with the medical school, whose general purpose was to convert the individual agreements of the hospitals into a master agreement, establishing the terms and conditions of the affiliation of the

hospitals with the medical school.

Contemporaneously in 1985 the DMC/WSU Health System, Inc. was formed. Harper and WSU were among the incorporators. The purpose of the corporation, as stated in its Articles of Incorporation, is

> "To be a cohesive preeminent academic health center evidencing the interdependent relationship [emphasis supplied] of Wayne State University and the other Medical Center institutions, and integrating clinical service, education, and research; to maintain centers of excellence..." (App G, p.63a).

The name was subsequently changed to the Detroit Medical Center (DMC), as a marketing decision.

The hospitals have subsequently been acquired by DMC, and are more than partners both legally and in the general sense of the word. The residents are paid by DMC, under the aegis of the dean's counsel and the American Counsel of Graduate Medical Education, with residency review programs performed by the hospital and university. These are "interdependent" activities, creating a mutually beneficial relationship to both entities. The hospital bills for services provided by a resident in the hospital. The Affiliation Agreement provides that the dean and the hospital president consult, and then if agreed upon, select one individual to serve as University Chairman and Hospital Chief of the same department. Either party can ask for termination of the individual. (App H, p.81a)

In 1990, **Dr. Fernando Diaz** became the Chief and Chairman of the Department of Surgery for WSU and Harper.

Shortly thereafter, Dr. Diaz initiated a written policy for both Harper and WSU prohibiting any department members from giving expert testimony on behalf of plaintiffs in medical malpractice cases (App I, pp.90a, 91a). Dr. Diaz specifically conditioned Dr. Austin's participation as a faculty member on Dr. Austin abstaining from medical malpractice testimony on behalf of plaintiffs (App J, pp.93a, 94a).

Dr. Austin protested the policy and only after threatening legal action was the policy formally rescinded during 1991.

Although the formal policy was rescinded in May 1991, Austin presented evidence that it was replaced by an unwritten policy and a continuing course of retaliatory conduct that sought to accomplish the same thing. Among other things, Dr. Diaz began to appear semi-regularly on the opposite side of cases in which Dr. Austin was testifying. Dr. Diaz even appeared as a witness for a complaint filed by a malpractice defendant against Dr. Austin, with the American Association of Neurosurgeons.

During 1992, Dr. Austin objected to granting unrestricted neurological surgery privileges to Dr. Lucia Zamorano on the grounds, *inter alia,* that she did not have the Ph.D. degree which she claimed and had not performed a neurological surgery residency. The controversy for reappointment lasted throughout 1992. At the beginning of 1992, Dr. Diaz, who had actively recruited and endorsed Dr. Zamorano for faculty and staff, summarily dismissed Dr. Austin from the Harper Hospital Credentials Committee.

Dr. Austin was the only person who objected to Dr. Zamorano, and the only physician who testified on behalf of plaintiffs in medical malpractice litigation.

In December 1992, the WSU medical school dean initiated an outside investigation of Dr. Diaz. The investigation was conducted by Dr. Robertson from the University of Tennessee. Dr. Robertson's report was critical of Dr. Diaz's administrative management of the department and recommended a series of modifications.

Approximately three days after Dr. Austin was interviewed by Dr. Robertson, and at about the same time Dr. Austin was dismissed from the Credentials Committee, Dr. Diaz summarily dismissed Dr. Austin from his position as Vice Chief of Neurosurgery, which position he had been in for the previous 18 years. When informed that he did not have the authority to perform a summary dismissal, Dr. Diaz caused an election to be held the following month where another physician, who had little contact with Harper, was made Harper Hospital's Vice Chief of Neurological Surgery. Dr. Zamorano was then approved by the Credentials Committee with Dr. Austin's replacement.

After his dismissals, on September 13, 1993, Austin corresponded his concerns regarding Dr. Zamorano to Keith Crain, Chairman of the DMC Board of Trustees.

During 1994, a complaint was filed against Dr. Zamorano with the Michigan Department of Licensing and Regulation, the state agency in charge of physician licensing, causing that agency to launch an investigation. Petitioner contends that Diaz, in his dual capacity for Harper and WSU, perceived that the investigation was instituted by Dr. Austin. Testimony was adduced that Dr. Zamorano generated in excess of a million dollars to Diaz's professional corporation and substantial public/governmental income and funding to both Defendants Harper Hospital and Wayne State University. A sufficient financial motive was thus established for

Defendants to continue to retaliate against Appellant's continued attack against Zamorano.

Subsequent to the Michigan Licensing Department complaint and concurrent with the licensing and regulation investigation, the University and Harper Hospital produced a **Brochure** (App L, pp.157a-177a) designed in part for "referring physicians and future patients," and sent a written request to staff and faculty doctors for information to include in the Brochure (App L, p.177a). The Brochure promoted the faculty and facilities at WSU, Harper and the DMC. Names and photos of the entire active faculty of the Wayne State University, Harper Hospital Neurological Surgery Department were included, including non physician personnel. Dr. Austin, an almost 30 year member of the staff and faculty, **was not included** in the Brochure **nor invited** to the photo session. Dr. Zamorano was photographed and is represented as M.D. and Ph.D.

The Brochure was produced by Dr. Diaz's wife, Vickie Diaz, an employee of Harper Hospital, whose picture also appears (App K, pp.104a-105a). Most of the funds for the production of the Brochure were from Harper Hospital. The Brochure was distributed to approximately 1,000 neurologists and neurosurgeons in Michigan, the United States and internationally, and also placed on the internet.

The Brochure was a joint cooperative production and marketing enterprise of Harper and WSU with the DMC. The logos contained throughout its contents attest to the interdependent joint activity of Harper and WSU in this venture. It was the intention of the state and Harper to profit from the Brochure, from which Petitioner was excluded.

It is Petitioner's contention that the practical effect of

its contents and the alleged purposeful omission of Dr. Austin from anywhere within its contents, was in retaliation for Plaintiff's continued criticism of Dr. Zamorano and testifying for plaintiffs in malpractice cases, and was intended to humiliate and harm Plaintiff and wrongfully and erroneously represent to the world that he was no long associated with the hospital and university. The publication of the Brochure, intentionally excluding Petitioner, instigated the lawsuit.

SUMMARY OF THE ARGUMENT

In Justice Scalia's opinion in *Lebron v. National R R Passenger Corp,* 513 US 374 (1995), it was noted that

> "We have held once, *Burton v. Wilmington Parking Authority*, 365 US 715 (1961), and said many times that actions of private entities can sometimes be regarded as government action for constitutional purposes [citations omitted]. It is fair to say that `our cases deciding when private action might be deemed that of the state have not been a model of consistency.'" *Edmondson v. Leesville Concrete Co,* 500 US 614, 632 (1991) (O'Connor, J., dissenting).

Although the post *Burton* case law of this Court may be strewn with apparent inconsistencies, none of the so-called "refinements" of this Court, *Blum v. Yaretsky*, 457 US 991 (1982); *Lugar v. Edmondson Oil Co,* 457 US 922 (1982); *Rendall-Baker v. Kohn*, 457 US 830 (1982); *NCAA v. Tarkanian, supra;*; *Lebron v. National R R Passenger Corp,* 513 US 374 (1995); or *American Mfrs Mut Ins v. Sullivan,* 526 US 40 (1999), have overruled the fundamental principal of *Burton* that where there is a symbiotic relationship between

a state entity and a private entity such that the two parties are intertwined and participants in a cooperative or "joint activity," the actions of the private entity may constitute state action and may give rise to civil rights liability.

In *Moose Lodge No. 107 v. Irvis*, 407 US 163, 175-177 (1972), it was noted that a symbiotic relationship exists and state action may be found, where a state and a private party are effectively partners or joint venturers in an enterprise.

In *Tarkanian, supra*, at 195, this Court also noted that a private entity may be a state actor even if the state entity is the one which ultimately takes the challenged action. This is especially true in situations such as the instant case where the state and private entity delegated power and authority to one individual, Diaz, and both stood to economically benefit by the joint production and marketing of the Brochure which, in retaliation, omitted Petitioner.

Ultimately, it must be said that the determinations of what conduct constitutes state action must be made on a case by case basis. *Lugar, supra*, at 939.

> "Only by sifting facts and weighing circumstances can the non-obvious involvement of the state in private conduct be attributed its true significance." *Burton, supra,* at 722.

In the instant case, Petitioner presented sufficient facts establishing that the production of the Brochure was a joint enterprise of WSU and Harper, designed for their mutual economic benefit. Further, the "mantel of authority" created by the unique dual position of Diaz, cannot be analyzed in a

vacuum as the lower courts did, but must be set against the factual background which established that both Harper and WSU had specific knowledge for many years of Diaz's retaliatory course of conduct against Petitioner seeking to chill his exercise of the constitutional right to testify for plaintiffs in medical malpractice cases, as well as questioning the false credentials of Zamorano. Harper, WSU and Diaz, through their interlocking economic agreements, all stood to reap substantial economic benefits from public and private monies in producing a brochure which not only falsely represented the credentials of Zamorano, and is also deliberately excluded Petitioner in retaliation for the exercise of his rights to free speech on important matters of public concern.

The grant of summary judgment to Harper is in conflict with the decisions of this Court in *Burton* and *Adicke*, but also a further violation of long standing precedent of this Court from *United States v. Diebold*, 369 US 654 (1962) through *Board of Ed, Island Trees Union Free School Dist No 26 v. Pico*, 457 US 853 (1982), that disputed issues of material fact and complicated issues involving motive and intent in First Amendment litigation should be submitted to the jury.

Perusal of Petitioner's complaint, paragraph 16(c), and the documents and admissions unearthed through contentious discovery proceedings reveals that Petitioner is a prevailing party under the catalyst for change doctrine. Petitioner's five year litigation has clearly benefitted the public, as well as vindicating himself, because as a direct result of his lawsuit, Defendants have changed their course of conduct, bringing them into compliance with Michigan law, and no longer falsely represent and market the credentials of one of their foremost income producing physicians, Zamorano, in their quest to obtain private and public monies. The denial of

attorney fees to Petitioner is error and should be reversed and remanded for further proceedings.

REASONS FOR GRANTING THE WRIT

I. THERE IS CONFUSION AS TO THE TESTS TO BE EMPLOYED TO DETERMINE THE "SYMBIOTIC RELATIONSHIP/ NEXUS" TEST AS USED IN CIVIL RIGHTS LITIGATION AND UNDER WHAT CIRCUMSTANCES THE ISSUE SHOULD BE SUBMITTED FOR JURY RESOLUTION.

A. Summary Judgment Should be Granted Sparingly in 42 U.S.C. § 1983 Claims Involving the Violations of First Amendment Free Speech Guarantees.

It has been a long standing position of this Court that in complicated cases involving constitutional or other important public issues, summary adjudication under Rule 56(c) of the Federal Rules of Civil Procedure may be undesirable.

In *Pico*, *supra*, this Court was presented with a civil rights action challenging a school board's removal of certain allegedly offensive books from school libraries. The Court of Appeals had reversed a grant of summary judgment and remanded for trial on the issue of whether the board's decision was motivated by constitutionally permissible justifications or by an impermissible desire to suppress ideas violative of the First Amendment. In affirming the reversal, this Court held that construing the supporting evidence most favorable to the non-moving party, there was a genuine issue

of material fact as to the board's motivation for removing the books which foreclosed summary judgment in its favor. This is especially true in First Amendment Free Speech litigation where motive and intent play leading roles and the proof is largely in the hands and minds of the defendants.

The non-moving party's inferences need only be "reasonable" in order to reach the jury. *Matushita Elec Indus Co v. Zenith Radio*, 475 US 574, 587 (1986), citing *Diebold, supra* at 655. The judge is not "to weigh the evidence and determine the truth of the matter, but to determine whether there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc*, 477 US 242, 249 (1986). A genuine issue for trial is presented when there is sufficient "evidence on which the jury could reasonably find for the non-moving party." *Id,* at 252.

The determination as to whether a private entity shall be held to be a state actor under this Court's symbiotic relationship/nexus doctrine is by its very nature a fact intensive inquiry. However, neither the intricacies or the difficulty of that determination should have any meaningful bearing on the constitutional right to have a case submitted to a jury for their ultimate resolution. Jury resolution of disputed issues of material fact is the backbone of our democratic form of government. This Court can and perhaps should encourage the lower courts use of the time tested procedural vehicle set forth in F.R.Civ.P. 49 to utilize a special findings or special instructions in cases such as presented by Petitioner, that require factual resolution as to whether the private entity, Harper, is a state actor for purposes of 42 USC § 1983, liability under the symbiotic relationship/nexus test.

B. Petitioner Engaged in Protected Speech.

It is uncontroverted and neither the District Court[1] or the Sixth Circuit took issue with Petitioner's contention that his conduct in testifying on behalf of plaintiffs in medical malpractice cases and criticizing the qualifications and credentials of a physician is protected speech and of public concern.

Petitioner submits that these retaliatory actions constitute an attempt to interfere with testimony across state lines, by conducting what is effectively a national attempt to interfere with and obstruct expert testimony. In all states, if there is no expert plaintiff testimony, there are no medical malpractice litigations. This conduct violates state law and Congressional intent.

Medical malpractice and peer review is a matter of public concern, subject of comprehensive state and federal legislation. Congressional findings and Federal legislation unequivocally reflect the overriding national need to provide incentive and protection for physicians engaging in effective professional peer review. 42 U.S.C. § 11101. There is clear federal policy to protect those who speak out from legal retaliation. The Congressional findings supporting the

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[1] On August 27, 1996, prior to the jury deliberations regarding the remaining defendants, the district court specifically found that any interference with the right to testify for plaintiffs in medical malpractice cases and a physicians right to speak out that another individual who may be given full staff privileges is incompetent, are First Amendment rights of public concern. (See Appendix D)

legislation are equally applicable to private medical malpractice beyond the hospital walls and bring private litigation within the legislative scheme and intent.

Under circumstances where there is a Congressional finding that medical malpractice and the need to improve the quality of medical care is a nationwide concern, there is an "overriding national need" to protect physicians engaging in professional peer review, and where the results of both private litigation, i.e. medical malpractice cases and internal hospital evaluations, i.e. internal peer review, must be reported on threat of statutory sanctions, the content of the speech that forms the basis for the evaluation must be deemed to be a public concern.

C. The Symbiotic Relationship of Harper and the State Actor WSU.

The lower courts, paid only lip service to the plethora of evidence establishing the close interdependence of Harper and WSU, and failed to properly address the extent of their symbiotic economic arrangements, as it related to Zamorano and the economic benefit of quashing expert testimony for plaintiffs. These facts, when coupled with the unique optional dual position jointly accorded to Diaz and the joint economic benefit sought to be achieved by the retaliatory conduct, raised sufficient disputed issues of material fact requiring jury resolution regarding the existence of a symbiotic relationship and the intimate state involvement in the aggrieved conduct.

I. Interdependence through the Master Affiliation Agreements and Articles of Incorporation.

The contents of the affiliation agreements and the articles of incorporation are replete with numerous and continuous references to the "interdependent relationship between Harper, as a member of the DMC, and WSU. Harper and WSU not only are signatories to the master affiliation agreements, but also original incorporators of DMC's Articles of Incorporation (App G, pp.63a, 69a, 70a; App H, pp.86a, 87a). They are *de facto* if not *de jure* partners.

The extent of the degree of interdependence was further established through the admissions of Harper President Broughton and WSU medical school Dean Sokol, as well as the testimony of Diaz.

Broughton testified that Harper and the other hospitals are wholly owned subsidiaries of the DMC and they are "more than partners legally and in the general parlance." (App K, p.99a).

Sokol, then Dean of the WSU medical school, testified that the affiliation agreement is designed to put the university and DMC into "partnership" and in fact that Harper and other members of the Detroit Medical Center are no longer separate institutions (App K, p.154a).

Even Diaz, in responding to inquiry as to whether it enhances the status of the WSU medical school to be associated with Harper opined that he did not know if it enhances it. "It is part of the same thing." (App K, p.113a).

2. Delegation of Mantel of Authority to Diaz - Unique Dual Position Prong.

The "delegation of authority" prong noted in *Tarkanian, supra,* in setting forth the analysis as to whether a private entity can be held liable as a state actor for Section 1983 purposes, was clearly established in the instant case sufficient to withstand a summary judgment test.

Plaintiff established and the district court properly noted that Harper and the State had placed Diaz in a unique dual position (App B, p.15a), being given the official position as Chairman and Chief of both Harper's and WSU's Departments of Neurosurgery.

What is of particular significance as it relates to the facts in the instant case, is that Harper's and WSU's delegation of power and authority to one person, Diaz, is entirely optional and not compelled by the Articles of Incorporation or the Master Affiliation Agreement and continued after they were specifically apprized of the first instance of retaliatory conduct, the 1991 no testifying for plaintiffs policy, a full four years prior to the production of the retaliatory Brochure.

The decision to imbue Diaz with the "enhanced" dual mantel of the authority, power and prestige attendant to and flowing from being placed as both WSU's and Harper's Chief of Neurological Surgery (See, *Tarkanian, supra* at 192), creates a question of material fact as to whether Harper, through Diaz, can be held to be a state actor under Section 1983 and the *Burton* symbiotic relationship doctrine where he engages in retaliatory conduct.

Harper and WSU's actions in placing Diaz in the dual position provided the mantel of authority that allowed and enhanced the harm caused by the actions of Diaz. *Tarkanian, supra* at 192. Harper and WSU, through its administrators

and Diaz, jointly and interdependently shared the perceived economic benefit of marketing Zamorano and stifling Petitioner's testimony. Diaz was in the perfect position to benefit his dual masters and his conduct was tacitly approved by both.

Through the mantel of authority delegated to Diaz and their joint economic motive and incentives, a jury could reasonably infer, *Diebold*, *supra* at 655, that Harper and WSU were intimately involved in retaliating against Petitioner for failing to reign in the full exercise of his Constitutional rights. See also, *Pico*, *supra*.

3. Mutual Economic Benefit and Motive.

In *Burton*, this Court made note of the mutual economic inter-relationship and benefit of the private restaurant and the state authority so as to establish Section 1983 liability under the symbiotic relationship test. In a similar vein, this Court in *Tarkanian*, 488 US at 192, discussed the "mutual benefit prong" of the symbiotic nexus test that the action of a private party may be deemed state action under Section 1983 if it delegates its authority to the private action, "or sometimes if it knowingly accepts the benefits derived from unconstitutional behavior."

Neither the Sixth Circuit or the District Court ever properly considered the delegation of authority prong to one individual or the mutual benefit prong to Harper and WSU and how a jury may have related these facts to the "challenged action."

In the instant case, there is no antagonist relationship between Harper and WSU. Both entities intended to

"mutually benefit" by the "mantel of authority" delegated to Diaz and the challenged conduct. See, *Tarkanian, supra* at 488 US f.n. 16, pp 196-197 (1988). Further, Petitioner developed a factual record of a series of mutual interlocking economic arrangements, kickbacks and tie-ins between Harper, WSU and Diaz, that far exceed the interdependence and symbiotic relationship existent in *Burton*.

The details of the incestuous economic arrangements and contracts between Harper, WSU, Diaz and Zamorano, individually and in their positions with Diaz's private practice group, University Neurosurgery Associates, is of import in considering the Zamorano issue and the course of conduct and actions against Petitioner, commencing with the policy prohibiting testifying for plaintiffs in medical malpractice cases, continuing with Diaz utilizing the mantel of his delegated power and prestige of his joint dual positions to impugn and undermine Petitioner's credibility by engineering and manipulating Petitioner's removal from the credentials committee and as Vice Chief of Surgery, and finally culminating in the joint Harper/WSU production and funding of the Brochure which purposely excluded Petitioner.

Broughton, Harper's past president and also associate professor at WSU, testified that Diaz is paid by Harper under a contract and also receives a salary position from WSU. Further, if a patient is seen in the hospital by Diaz, Harper bills for the hospital services and Diaz bills for his professional services (App K, pp.100a-102a). The entities and individuals benefit.

Both Diaz's and Zamorano's WSU salary is "paid back" to WSU by Harper (Diaz Dep 06-13-96, pp 61-63; App K, pp.146a-150a). An exhibit was also produced under the signature of Diaz and on joint WSU/DMC logo letterhead

confirming that Harper will reimburse WSU for 100% of Zamorano's annual salary and fringe benefits (App J, p.95a), Diaz testified that Zamorano is not only a member and officer of his professional service group (University Neurosurgery Associates), but is perhaps the top money generator within his P.C., generating in excess of one million dollars. Further, a portion of Zamorano's WSU salary is paid by Diaz's corporation, University neurosurgery Associates! (Diaz Dep, App K, pp.146-147a, 149a).

Broughton testified that Zamorano generates more money for the hospital than any of the neurosurgeons (Broughton Dep, App K, p.103a).

Diaz also characterized the economic relationship of his private corporation to the university as a form of "tithing," revealing that 9% of what he makes in his private clinic goes to the university: 3% to the dean as a "dean tax" and 6% in a fund for Medical Education and Research (Diaz Dep, 2-08-96, App K, pp.107a-109a, 112a).

Whether it be characterized as tithing or is in actuality a series of questionable kick-backs and subsidies, the interlocking economic relationship between Harper, WSU and Diaz is, if not incestual, at least symbiotic and provides a factual backdrop to establish Section 1983 liability on Harper under *Burton* and *Tarkanian*. These unusual economic inter-relationships are not only evidence of the "cooperative and joint activity between the state and private" entity as effective partners or joint venturers, but also under this Court's reasoning in *Pico* could be reasonably found to be the real motives behind Diaz's actions against Petitioner, thereby precluding summary judgment and mandating jury submission.

Petitioner's removal from the Credentials Committee and as Vice-Chief of Neurosurgery were economically motivated and evidence a pattern of retaliation for the exercise of his rights to free speech, culminating in exclusion from the Brochure. The Brochure and the invitational marketing letter of Vicki Diaz were part of the record and were separate exhibits attached to exhibits to Plaintiff's Response to All Defendants' Motions for Summary Judgment.

Thirty years ago in *Adicke v. S H Kress & Co, supra*, this Court concluded that summary judgment was not appropriate where the parties appeared to have participated in a "joint activity" which violated Petitioner's constitutional rights.

In the present case, Petitioner presented more than ample evidence for a jury to properly conclude that the funding for, marketing and production of the Brochure, which excluded him, was a "cooperative" and joint activity between the State, WSU and the private entity Harper, that they were "effective partners in the enterprise." The Brochure, the "challenged conduct," was created by an agent of both to economically benefit the joint enterprise.

The entities and the "challenged conduct" are so intertwined and insinuated that it is impossible to remove either party from the enterprise and be left with the same entity. A jury could reasonably find that the challenged conduct in excluding Petitioner from the Brochure, both carried the "imprimatur" (*Blum, supra* at 1003) and was "fairly attributable" (*Lugar, supra* at 452) to the state so as to render Harper liable under 42 U.S.C. § 1983.

The entities and challenged conduct are symbiotic beyond the facts presented in *Burton*. If the symbiotic

relationship doctrine has any continuing vitality, Petitioner should either have been accorded a ruling in his favor as a matter of law, or entitled to have his case proceed to the jury for their ultimate resolution.

II. PETITIONER PROVIDED A PUBLIC SERVICE AT HIS OWN EXPENSE BY EXPOSING THAT THE DEFENDANT WAS KNOWINGLY MISREPRESENTING THE CREDENTIALS OF ITS PHYSICIAN. HE IS A PREVAILING PARTY ON THIS ISSUE AND IS ENTITLED TO ATTORNEY FEES.

Petitioner was clearly a prevailing party on a significant issue in his lawsuit, important both to the private litigation and to the public sector. Petitioner had incurred approximately five years of retaliation, commencing in 1991, from his department head Dr. Fernando Diaz, as a result of Petitioner having continued to testify in medical malpractice cases on behalf of malpractice victims contrary to the wishes of Diaz and for criticizing the academic credentials of Zamorano, who Diaz brought to Harper and gave full neurological surgical privileges. Through the course of discovery in this lawsuit, sufficient facts surfaced and sufficient pressures were brought to bear where Defendants could no longer continue to misrepresent Zamorano's false credentials to both the public and private sectors. There is no dispute that this lawsuit acted as the catalyst for change, served a private and public service, and occurred as a result of the private funds and efforts of Petitioner. Worse, discovery revealed that Defendants were aware of the truth all along, ever since 1991, yet continued to perpetuate a fraud on the public until it could no longer do so.

Both lower courts paid little attention to Petitioner's claim for attorney's fees. Both decisions miss the point that Petitioner suffered First Amendment retaliation as a direct result of his criticisms in an effort to keep him quiet and accomplished a goal of his lawsuit as well as a public benefit when Defendants could no longer market a physician's false credentials to the public. Austin obtained personal vindication and compelled Defendants to comply with Michigan Statute, MCL 333.16221 (D) and (E), which prohibits misleading advertising and misrepresentations to a consumer or patient (App E, pp.46a-49a). The lower courts denial of attorney fees fails to acknowledge the congressional intent in enacting the attorney fee statute and fails to acknowledge the public service that Petitioner brought about. A person is entitled to know the true credentials of the doctor who operates on the brain.

The denial of attorney fees was against the backdrop of a surfaced immigration document indicating that the Defendants knew in 1991 that no Ph.D. degree existed (App J, pp.96a-98a); fraudulent translations being submitted in a response to an order compelling production of the Ph.D. degree and very specific testimony from Diaz that the change in representing Zamorano's credentials was a result of this lawsuit (App K, pp.115a-116a, pp.123a-146a). The denial of attorney's fees is also against the backdrop of Zamorano being engaged in research funded by the federal government.

42 U.S.C. 1988 (b) provides that "the court, in its discretion, may allow the prevailing party, other than the United States, reasonable attorney fees as part of the cost."

Justice Brennan, concurring and dissenting in part in *Hensley v. Eckerhart,* 461 US 424 (1983), quoted from S. Rep. No. 94-1011, p 6 (1976):

> "All of these civil rights laws depend heavily upon private enforcement, and fee awards have proved an essential remedy if private citizens are to have a meaningful opportunity to vindicate the important congressional policies which these laws contain." 461 US at 424.

This Court has made it clear in the past that an award of attorney fees is in part recognition of the social value of civil rights litigation. Justice Brennan spoke in *City of Riverside et al v. Rivera et al,* 477 US 561 (1986):

> "As an initial matter, we reject the notion that civil rights actions for damages constitute nothing more than a private tort suit benefitting only the individual plaintiffs whose rights were violated. Unlike most private tort litigants, a civil rights plaintiff seeks to vindicate important civil and constitutional rights that cannot be valued solely in monetary terms. See *Carey v. Piphus*, 435 US 247, 266 (1978). And congress has determined that `the public as a whole has an interest in the vindication of the rights conferred by the statutes enumerated in section 1988, over and above the value of a civil rights remedy to a particular plaintiff...'"

> *Hensley*, 461 US at 444 n 4 (Brennan, J., concurring in part and dissenting in part). "Regardless of the form of relief he actually obtains a successful civil rights plaintiff often secures important social benefits that are not reflected in nominal or relatively small damage awards." 477 US at 574.

Justice O'Connor reaffirmed the principles of the "prevailing party" as discussed in *Hensley* and by the lower courts in *Texas State Teacher Association et al v. Garland Independence School District et al*, 489 US 782 (1989):

> "We think the language of *Nadeau v. Helgemoe*, quoted in our opinion in *Hensley*, adequately captures the inquiry which should be made in determining whether a civil rights plaintiff is a prevailing party within the meaning of Section 1988. If the plaintiff has succeeded on `any significant issue in litigation which achieves some of the benefit the party sought in bringing suit,' the plaintiff has crossed the threshold to a fee award of some kind. *Nadeau,* 581 F2d 278-279. The floor in this regard is provided by our decision in *Hewitt v. Helms*, 482 US 755 (1987). As we noted there, `respect for ordinary language requires that a plaintiff receive at least some relief on the merits of his claim before he can be said to prevail.' *Id*, 760. Thus, at a minimum to be considered a prevailing party within the meaning of section 1988, the plaintiff must be able to point to a resolution of the dispute which changes the legal relationship between itself and the defendant..." 489 US at 791, 792.

Recognizing that relief can be something other than a formal judgment, the lower courts have awarded attorney's fees to the "prevailing" party, including situations where the defendant voluntarily ceases an unlawful practice as a result of the lawsuit. *Doe v. Busbee*, 684 F2d 1375, 1379 (11th Cir 1982); *North Cross v. Board of Education of Memphis City*

Schools, 611 F2d 624 (6th Cir 1979), cert. denied, 447 US 911 (1980); *Conservation Law Foundation of New England, Inc v. Secretary of the Interior*, 790 F2d 965 (1st Cir 1986).

Through his lawsuit, Plaintiff has substantially changed the legal relationship between himself and the defendant. He is no longer the recipient of overt harassment and retaliation, and the defendant no longer persistently misrepresents its staff member to the public in violation of state statute. This is not a di minimus victory. The average person may no longer be deceived with respect to the credentials and education of the physician who is about to operate on this person's brain and the Congressional intent as articulated at 42 U.S.C. 11101 is given effect.

The Sixth Circuit has adopted "the catalyst theory." *Moros v. City of Euclid*, 863 F2d 49 (1988).

> "Under this theory the plaintiff must first establish some basis of law for his claim. Second, he must demonstrate his lawsuit was the cause of the change and the defendant's behavior that provided the relief. The first inquiry is a legal one, the second is factual." *Johnston;* see also *Dover v. Rose*, 709 F2d 436 (6th Cir 1983).

Harper was clearly a defendant in this lawsuit and the lower court at the time the change came about, and this lawsuit was the catalyst. Harper, through Diaz and others maintaining dual positions within the facility, made the decision to compel Zamorano to truthfully represent her credentials. There is also no dispute this change came about as a result of this lawsuit. Diaz's deposition testimony made this fact abundantly clear (App K, 135a).

The H-1 immigration document that surfaced during the course of discovery demonstrated that the Defendants were fully aware from 1991 that Zamorano did not have a Ph.D. degree. Everywhere on the form where a "Ph.D." degree was to be checked off, it was crossed out and replaced with "M.D." (App J, pp.96a-98a). In spite of the Defendants' knowledge and in the face of continuing criticism from Petitioner that Zamorano's credentials were false, this Defendant continued to foist an unqualified person upon the public solely for monetary gain while at the same time attempting to stifle the Petitioner, violating his First Amendment rights in the process. The Ph.D. degree was likely brandished because Zamorano was not and could not be board certified. She never performed a residency in neurosurgery, necessary for board certification.

The complaint specifically referenced retaliation for criticizing credentials:

> "Paragraph 16c. That during and prior to 1994, in his capacity as a member of the Harper Hospital Credentials Committee, Dr. Austin objected to allowing full surgical privileges to Harper Hospital to physicians brought to the neurosurgical department by Dr. Diaz, for the reason that the particular surgeon had only limited neurosurgical training, was not and could not be board certified, did not hold a doctorate degree as professed, was denied full privileges in another area hospital, and was only allowed secondary privileges at a second area hospital. In retaliation for Dr. Austin having spoken out and objecting to allowing full and unrestrictive privileges to the physician endorsed by Dr.

Diaz, Dr. Diaz dismissed Dr. Austin from the Harper Hospital Credentials Committee."

There is no legitimate doubt that retaliation against Petitioner for criticizing Zamorano's credentials was a major part of this lawsuit. Retaliation and continuing retaliation is specifically alleged. Failing to award attorney fees for exposing Zamorano at his own expense simply serves to make Petitioner pay for what should never have occurred and is the antithesis of the Congressional intent behind 42 U.S.C. 1988. "Private enforcement" was not intended to be synonymous with private payment.

CONCLUSION

Petitioner presented abundant evidence of the interrelationship and interdependence of WSU and Harper. Petitioner also presented abundant evidence of the nexus of the "challenged conduct" to Diaz, and the joint economic benefit that would be shared by WSU and Harper flowing from his conduct. The real question before this Court is whether it desires to continue the concept of civil rights liability upon a private entity operating with a government entity, and if so, whether the issue should always be decided by a court, or is it a jury question.

Craft v. Vanderbilt University, 940 F Supp 2d 1185 (M.D., Tenn 1996), a case involving the failure to disclose the radioactive nature of experiments conducted on pregnant women by a foundation and the University and State of Tennessee is the only recently reported decision since *Adicke, supra,* which counsel has found where the court ruled the issue should be sent to a jury. The Court noted, in sifting through the symbiotic relationship doctrine case law, the existence of genuine issues of material fact because a

symbiotic relationship could be found by the **"cooperative and joint activity between the state and private entity**, *Burton, supra,* or where a "state and private party are **effective partners or joint venturers in an enterprise.**" The decision is noteworthy not because of the court's ruling, but because the court ruled there were fact questions for jury resolution. This is a trial court decision. It appears that in all other reported appellate decisions, the court itself resolves the issue of state action and symbiotic relationship, and does not submit the issue to a jury. Is this what was intended in *Burton*?

In *Tarkanian, supra*, this Court noted the general state of the law:

> "In the typical case raising a state-action issue, a private party has taken the decisive step that caused the harm to the plaintiff, and the question is whether the State was sufficiently involved to treat that decisive conduct as state action. This may occur if the State...the legal framework governing the conduct, delegates its authority to the private actor, e.g., *West v. Atkins,* 487 US 42, 101 LEd2d 40, 108 S Ct 2250 (1988); or sometimes if it knowingly accepts the benefits derived from unconstitutional behavior, *e.g., Burton v. Wilmington Parking Authority, supra.* Thus, in the usual case we ask whether the State provided a mantle of authority that enhanced the power of the harm-causing individual actor." *Id*, 488 US at 192 (Emphasis added).

Having thus stated the law, when should it be applied to the facts as found by a jury? The current state of the law,

as it has evolved, is never. Therefore, cases involving significant questions of fact and the mental state of the actors, crucial to a fact intense inquiry, are being routinely, if not universally, decided by District and Appellate Court judges. Assuming due deference to F.R.Civ.P. 56 duties and obligations of the Court, has there never been a circumstance where the facts should be a jury question? Is there a silent policy that the concept is in disfavor, and therefore allegations of symbiotic relationship are discouraged by decision, without overruling *Burton*?

The facts and circumstances of this case are more compelling than *Burton*. If liability can be established where two parties participate, how can two entities acting through the same person for their mutual economic benefit, be deemed not to be participating. That is the fact situation of this case, and it has been ignored by two lower courts.

Finally, Petitioner sustained five years of retaliation for attempting to expose the false credentials of a doctor, whose false credentials were being marketed for the financial gain of the hospital and university. Only after discovery uncovered so much information that the truth could not be concealed did the Defendants compel truthful disclosure to the public. The same discovery revealed that WSU and Harper had been aware of the false credentials all along.

Petitioner was clearly a prevailing party both in his private litigation and by the public service he performed by compelling truthful disclosure. Rather than reward him for his public service, the lower courts effectively punished him for his time, effort and funds, denying him the attorney fees due him under 42 U.S.C. 1988. These decisions thwart the Congressional intent found at 42 U.S.C. 11101.

Respectfully submitted,

/s/_____
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DATED: January 10, 2000

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

[Filed October 13, 1999]

Nos. 98-1555 & 98-1556

DR. DONALD AUSTIN,
Plaintiff-Appellant/ Cross-Appellee,

v.

DR. FERNANDO DIAZ,
DR. ROBERT SOKOL,
WAYNE STATE UNIVERSITY BOARD OF GOVERNORS,
Defendants,

HARPER HOSPITAL,
Defendant-Appellee/ Cross-Appellant.

On Appeal from the United States District Court for the Eastern District of Michigan

BEFORE: GUY, RYAN, and MOORE, Circuit Judges.

RYAN, Circuit Judge. The plaintiff, a neurosurgeon and a member of the Neurosurgery Department at Harper Hospital, filed a 42 U.S.C. § 1983 claim alleging that the defendants retaliated against him for his exercise of First Amendment rights. The plaintiff is also a faculty member with the Wayne State University Medical School. The district court granted summary judgment in favor of Harper on the ground that Harper is not a state actor and denied both the plaintiff's and Harper's motions for attorney fees. The plaintiff appeals the summary judgment dismissing the plaintiff's retaliation claim against Harper, and both parties appeal the district court's denial of attorney fees. We affirm the district court's grant of summary judgment and the denial of attorney fees to both parties.

I.

The plaintiff has enjoyed staff privileges at Harper, a private hospital in Detroit, for over three decades. For most of this period, he has also served as an unpaid faculty member for WSU Medical School's Neurological Surgery Department. Harper is one of several member institutions of the Detroit Medical Center. Harper and the other DMC members participate in the medical education and training programs for the WSU Medical School. Harper has long served as a teaching hospital for WSU residents. It is undisputed that Harper and the WSU Medical School share a close connection, as evidenced in various agreements between WSU and the DMC member institutions as well as DMC's Articles of Incorporation. The parties are well aware of the contents of these documents, so we need not recite them here.

In 1990, Dr. Fernando Diaz became the Chief of the Department of Neurosurgery for Harper and the Chairman of the WSU Neurological Surgery Department. Most, if not all, of the other faculty members of the WSU Neurological Surgery Department also enjoy staff privileges at DMC hospitals, including Harper.

According to Dr. Austin, he is a victim of unlawful retaliation by Harper because he exercised his First Amendment rights by acting as an expert witness for plaintiffs in medical malpractice lawsuits, which was contrary to a 1990-91 written policy of Dr. Diaz's departments that prohibited such activity, and by objecting to Harper's granting of unrestricted privileges to Dr. Lucia Zamorano. Plaintiff charges that Harper retaliated against him for these activities by: (1) removing him from the Credentials Committee; (2) removing him as Vice Chair of the Neurosurgery Department; and (3) omitting his name and photograph from a brochure promoting the WSU Neurological Surgery Department.

The plaintiff filed a complaint under 42 U.S.C. § 1983 against Harper, WSU, Dr. Diaz, and Dean Sokol of the WSU Medical School alleging unlawful retaliation. The district court granted summary judgment in favor of Harper on the grounds that Harper was not of itself a state actor, and that the plaintiff failed to produce sufficient evidence to demonstrate that Harper is chargeable as a state actor by reason of any nexus or "symbiotic relationship" with WSU. In its written opinion, the district court described the challenged conduct as the plaintiff's removal from Harper's Credentials Committee and the Vice Chief position; the opinion did not address the WSU brochure.

Concerning attorney fees, the district court held that the plaintiff was not a "prevailing party" entitled to attorney fees under 42 U.S.C. § 1988 and also denied attorney fees pursuant to 28 U.S.C. § 1927, finding no evidence of any unreasonable or vexatious conduct by defense counsel. The district court likewise denied Harper's motion for attorney fees pursuant to 42 U.S.C. § 1988, finding that the plaintiff had no reason to believe that his claim against Harper was frivolous, unreasonable, or groundless considering the close relationship between Harper and WSU and Dr. Diaz's dual appointments. It also denied Harper's request for attorney fees pursuant to 28 U.S.C. § 1927 or the court's inherent power, finding no evidence that the plaintiff's counsel acted in bad faith, unreasonably or vexatiously.

II.

A.

This court reviews a grant of summary judgment *de novo,* employing the same test as the district court. *Henegar v. Banta,* 27 F.3d 223, 224 (6th Cir. 1994). In reviewing summary judgment motions pursuant to Fed.R.Civ.P. 56(c), a court must view the evidence in the light most favorable to the nonmoving party to determine whether a genuine issue of material fact exists. *Adickes v. S.H. Kress &* Co., 398 U.S. 144, 157 (1970).

42 U.S.C. § 1983 is intended to "deter state actors from using the badge of their authority to deprive individuals of their federally guaranteed rights and to provide relief to victims if such deterrence fails." *McKnight v. Rees,* 88 F.3d 417, 419 (6th Cir. 1996), *aff'd sub nom., Richardson v.*

McKnight, 521 U.S. 399 (1997). To establish a § 1983 claim, a plaintiff must demonstrate that the defendant: (1) deprived him of a right guaranteed under the United States Constitution or laws; and (2) acted under color of state law. *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 155-56 (1978).

A private defendant may be subject to § 1983 liability only if its conduct qualifies as "state action," which may be established under one of three tests: (1) the nexus or symbiotic relationship test; (2) the public function test; or (3) the state compulsion test. *Brentwood Academy v. Tennessee Secondary Sch. Athletic Assn.*, 180 F. 3d 758, 763 (6th Cir. 1999); *Ellison v. Garbarino*, 48 F.3d 192, 195 (6th Cir. 1995). "'[A] State normally can be held responsible for a private decision only when it has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the State.'" *Adams v. Vandemark*, 855 F.2d 312, 314 (6th Cir. 1988) (quoting *Blum v. Yaretsky*, 457 U.S. 991 (1982)).

The plaintiff argues that the district court erred by failing to consider the WSU brochure in ruling that Harper is not a state actor. He contends that the brochure, the various agreements between Harper and WSU, and Dr. Diaz's dual positions with Harper and WSU demonstrate a symbiotic relationship between WSU and Harper sufficient to support a finding of state action on the part of Harper.

The symbiotic relationship or nexus test was first recognized by the Supreme Court in *Burton v. Wilmington Parking Auth.*, 365 U.S. 715 (1961). In refining the application of the nexus test, we have noted that the test focuses on the relationship between the state and the

challenged action, not merely the state and the private entity. Miscellaneous ties between the state and a private entity alone are insufficient to support a finding of state action. Thus, in *Wolotsky v. Huhn,* 960 F.2d 1331, 1335 (6th Cir. 1992), for example, we explained that "the action of a private party constitutes state action when there is a sufficiently close nexus between the state and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the state itself." *Id.* Likewise, in *Crowder v. Conlan,* 740 F.2d 447 (6th Cir. 1984), we declined to find that a private hospital's restriction of a physician's staff privileges constituted state action because there was no evidence that the state exercised "'coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the State.'" *Id.* at 452 (quoting *Blum,* 457 U.S. at 1004).

In light of this authority, the plaintiff's reliance on written agreements between Harper and WSU and Dr. Diaz's dual positions in the two institutions to establish state action is unavailing. We agree with the district court that the agreements between the DMC and WSU, along with the DMC's Articles of Incorporation, demonstrate a clear cooperative relationship between Harper and WSU. However, the plaintiff has offered no evidence that WSU influenced Harper's decisions as to committee membership or positions within its Neurosurgery Department, which is part of the conduct challenged in this case. To the contrary, the 1980 Memorandum of Agreement between WSU and the DMC members provides that decisions involving "appointment or promotion" of hospital staff "shall be made in accordance with criteria and procedures established for the

Medical Staff at that Hospital" and does not provide for any participation by WSU in such decisions.

Dr. Diaz's dual positions with WSU and Harper, likewise, do not establish the state's role or connection to the challenged conduct. The plaintiff has failed to produce any evidence--other than his own speculation--that Diaz was subjected to coercive power or significant overt or covert encouragement by the state in making decisions concerning the plaintiff's committee membership or title within Harper. There is no evidence that Dr. Diaz was acting in any capacity other than that as Chief of the Neurosurgery Department at Harper, a private entity, when he made these decisions.

Harper's alleged role in producing the WSU brochure does not change this result. The plaintiff maintains that WSU and Harper were engaged in a joint venture in producing the brochure because the brochure was funded by Harper, assembled by Dr. Diaz's wife, a Harper employee, and was intended for the mutual economic benefit of WSU and Harper.

We note in passing that, interestingly, this argument presents the mirror image of a typical state action case. Most state action cases involve situations where a private entity is responsible for the challenged action, and the court "ask[s] whether the State provided a mantle of authority that enhanced the power of the harm-causing individual actor." *NCAA v. Tarkanian,* 488 U.S. 179, 192 (1988). Here, there is no question that the challenged action--the brochure--emanated from the medical school at WSU. While this does not end our inquiry, we proceed cautiously in applying the nexus test under these circumstances, adhering to the rule that a mere

relationship between the state and the private entity is insufficient to impose liability on the private entity.

Even assuming that Harper funded the brochure and derived an economic benefit from it, there is no evidence that Harper influenced the challenged conduct, that is, the decision to exclude the plaintiff's name and picture from the list of WSU faculty members appearing in the brochure. There is also no evidence that Dr. Diaz, in making this decision as the Chairman of the WSU Neurological Surgery Department, was coerced or influenced in any way by Harper or that he acted outside his authority as Chairman of the Department. The plaintiff points to a trial court opinion, *Craft v. Vanderbilt Univ., 18 F.* Supp.2d 786 (M.D. Tenn. 1998), in arguing that a private party's joint venture with the state renders the private party a state actor. Contrary to the plaintiff's suggestion, we believe that *Craft* is consistent with our reasoning here. The court in *Craft* noted that the two private entities participated in decision making concerning the medical experiments that constituted the challenged conduct in that case. The present case is devoid of such evidence.

Finally, we reject the plaintiff's argument that the district court erred by failing to discuss the WSU brochure in its written opinion in evaluating whether Harper was a state actor. Both the plaintiff's counsel and the district court addressed the brochure at oral argument, and the court noted that Dr. Diaz decided to omit the plaintiff's name and picture from the brochure in his capacity as the Chairman of the WSU Neurological Surgery Department. Although the court's written opinion did not address the brochure, this oversight is immaterial.

B.

We turn next to the parties' arguments concerning attorney fees. The decision to award attorney fees under 42

USC. § 1988 is committed to the discretion of the trial judge. *Loudermill v. Cleveland Bd. of Educ.*, 844 F.2d 304,308 (6th Cir. 1988). We review a district court's decision on attorney fees under this statute for abuse of discretion. *Tarter v. Raybuck*, 742 F.2d 977, 986 (6th Cir. 1984).

42 U.S.C. § 1988(b) authorizes a court to award attorney fees to the prevailing party in a § 1983 action. A party need not have a judgment entered in its favor to qualify as a "prevailing party." A party that achieves a substantial portion of the relief sought or succeeds on a significant issue via settlement or a consent decree may be entitled to attorney fees. *Maher v. Gagne*, 448 U.S. 122 (1980); *Othen v. Ann Arbor School Bd.*, 699 F.2d 309, 313 (6th Cir. 1983). "A plaintiff [who does not obtain direct relief] may also qualify as the prevailing party if his lawsuit is found to be the 'catalyst' which causes the defendant to make significant changes in its past practices." *Othen*, 699 F.2d at 313.

The plaintiff argues that he was the "prevailing party" under the catalyst theory because Harper no longer represents to the government or the public that Dr. Zamorano holds a Ph.D. degree. The plaintiff maintains that this was "one of the key objectives of" his lawsuit. The district court did not abuse its discretion in rejecting this argument. The plaintiff's lawsuit did not request any relief relating to WSU's or Harper's ability to represent Dr. Zamorano as holding a Ph.D. Indeed, even the plaintiff's internal complaints concerning Dr. Zamorano related to Harper's decision to grant full staff privileges to her, rather than the institution's description of her academic credentials.

We also affirm the district court's denial of attorney fees to Harper under 42 U.S.C. § 1988. The district court did not abuse its discretion in finding that the plaintiff's claim was not frivolous, unreasonable, or without foundation given the

documented ties between Harper and WSU. *See Hughes v. Rowe*, 449 U.S. 5, 14 (1980).

We review the district court's decision to award attorney fees under 28 U.S.C. § 1927 or under the court's inherent authority for abuse of discretion. *Holmes v. City of Massillon, Ohio*, 78 F.3d 1041, 1049 (6th Cir. 1996); *Black v. Ryder/P.I.E. Nationwide, Inc.*, 970 F.2d 1461, 1472 (6th Cir. 1992). After examining the arguments and the district court's opinion, we conclude that the district court applied the proper standards and did not abuse its discretion in denying attorney fees to the plaintiff pursuant to 28 U.S.C. § 1927 and to Harper pursuant to 28 U.S.C. § 1927 and the court's inherent authority.

C.

Finally, we note that the defendant has asked us to reconsider the opinion of a motions panel. The defendant filed a motion to dismiss the plaintiff's appeal of the summary judgment order on the ground that the appeal was untimely. A motions panel denied the motion, holding that the district court had not yet entered a Rule 58 judgment dispositive of the full case. While we may well have authority to revisit this jurisdictional issue, we decline to do so in this case given our holdings on the merits. *See Duran v. City of Douglas, Ariz.*, 904 F.2d 1372, 1375 (6th Cir. 1989); *Atlantis Group, Inc. v. Warner, Norcross & Judd*, No. 92-2318, 1994 WL 319091, at *1 n.1 (6th Cir. Mar. 30, 1994) (unpublished disposition). *Cf. Jones v. Cassens Transp.*, 982 F.2d 983, 987 (6th Cir. 1993).

III.

The district court's judgment is AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

[Filed March 31, 1998]

No. 95-CV-73247-DT

DR. DONALD AUSTIN,
Plaintiff,

v.

DR. FERNANDO DIAZ, M.D.,
DR. ROBERT SOKOL, M.D.,
HARPER HOSPITAL, and
THE BOARD OF GOVERNORS
OF WAYNE STATE
UNIVERSITY,
Defendants.

OPINION

This matter is before the Court on defendant Harper Hospital's motion for attorney fees and plaintiff's motion for attorney fees.

On August 11, 1995, plaintiff brought this action against all of the named defendants. Plaintiff brought this

action pursuant to 42 U.S.C. § 1983 claiming that the defendants retaliated against him for exercising his rights under the First Amendment of the Constitution.

On May 9, 1996, defendant Harper Hospital moved for summary judgment contending, among other reasons, that plaintiff could not prevail on his § 1983 claim against Harper Hospital because Harper Hospital was not a "state actor" and was not a "person acting under color of law." While plaintiff acknowledged that Harper Hospital is not a state institution or state agency, plaintiff nevertheless contended that it had a "symbiotic relationship" with Wayne State University and that there was a sufficiently close relationship between Wayne State and Harper Hospital with respect to the conduct which plaintiff claims harmed plaintiff, that the action of Harper Hospital should be treated as "state action."

In support of this "symbiotic" relationship, plaintiff asserted the following:

> The relationship between Harper Hospital and Wayne State University is interdependent, as intended in the DMC Articles of Incorporation. Exhibit 2. The entities are entwined and inseparable. They do not operate independent of each other and significantly rely on one another. They share facilities and personnel. They generate money for each other and mutually benefit. Broughton, pg 42. They are contractually bound by an Affiliation Agreement, and in a de jure and de facto partnership in the DMC, irrespective of government funding or regulation. They are

> truly in a symbiotic relationship, in reality and legally. Together they are in the hospital business.

(Pl.'s Br. in Opp. at 7-8).

> The extent of this "de facto" partnership is established by the Master Affiliation Agreement. At least annually, the hospital and university have to consult to discuss personnel compensation, proposed reassignment of personnel as it affects the hospital, changes in operational activities or organizational structure, and funding. They are to consult each other to seek a chairman/chief. Hospital appointments for university faculty in the Departments of Radiology, Pathology, and Anesthesiology are virtually compelled. There must be joint review of research, education, and direct impact on patient care. There must be mutual dispute resolution and satisfaction "with the conduct of programs at that HOSPITAL and at the UNIVERSITY. . .". [sic] The Hospital and the University each have the ability to ask the other to remove the chairman/chief.

(Id. at 12).

Harper Hospital denied that any action on the part of Harper Hospital with respect to plaintiff was in conjunction with Wayne State University and specifically denied the existence of any "symbiotic relationship." On July 3, 1996,

this Court granted defendant's motion for summary judgment concluding that the evidence offered by plaintiff in support of his claim as to the existence of a "symbiotic relationship" was not sufficient to establish the existence of a genuine issue of material fact. The Court therefore granted summary judgment in favor of Harper Hospital.

Harper Hospital's Motion for Attorney Fees

Presently before the Court is Harper Hospital's motion for attorney fees. Harper Hospital contends that it is entitled to attorney fees pursuant to 42 U.S.C. § 1988, 18 U.S.C. § 1927, and under the Court's "inherent power" to award attorney fees.

42 U.S.C. § 1988 permits the Court "in its discretion" to award to the prevailing party a reasonable attorney fee. Harper Hospital acknowledges that in order to recover attorney fees in this action, the Court must find that "The plaintiff's action was frivolous, unreasonable, or without foundation even though not brought in subjective bad faith." *Wayne v. Village of Sebring,* 36 F.3d 517, 530 (6th Cir. 1994). Attorney fees may also be appropriate where plaintiff continued the litigation after it became clear that the claim is frivolous, unreasonable or groundless. *Rounseville v. Zahl,* 13 F.3d 625 (2nd Cir. 1994); *see also Allen v. City of Los Angeles, 66* F.3d 1052 (9th Cir. 1995).

Although this Court granted summary judgment in favor of Harper Hospital because plaintiff was unable to present sufficient evidence to create a genuine issue of fact with respect to plaintiff's claim that Harper Hospital was a "state actor," this Court is not satisfied that when plaintiff

brought the claim he had reason to believe that the claim was "frivolous, unreasonable, or groundless." The evidence presented clearly showed a close relationship between Harper Hospital and Wayne State and in particular, the "dual role" that Dr. Fernando Diaz filled as Chief of the Department of Neurosurgery at Harper Hospital and Chairman of the Department of Neurosurgery at Wayne State University. Furthermore, based on the evidence presented, this Court does not believe that it was unreasonable for plaintiff to believe that Dr. Diaz was responsible for the "harm" that plaintiff alleged he suffered e.g., "injury and damage to his professional reputation, medical practice, and standing in the community. . . ." (Pl.'s Compl. at ¶ 23).[1]

The Court was satisfied that there was a close relationship between Harper Hospital and Wayne State University and that, in fact, Dr. Diaz filled a unique dual role; nevertheless, this Court was not persuaded that Harper Hospital was a "state actor." Although the Court reached this conclusion, the Court does believe that the facts relied upon by plaintiff could lead a reasonable plaintiff (and plaintiff's attorney) to believe that Harper Hospital was engaging in state action. In this Court's opinion, such a claim by plaintiff would not be unreasonable or frivolous so as to warrant the imposition of attorney fees. Furthermore, the Court has no reason to believe that either plaintiff, or plaintiff's counsel, lacked an honest but (in this Court's opinion), mistaken belief

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[1] The Court does not mean to suggest that the "harm" or "adverse effect" on plaintiff was "improperly" caused by the acts of Dr. Diaz, i.e., whether or not Dr. Diaz retaliated against him for the exercise of his First Amendment rights. That was an issue to be resolved by the jury.

that a "symbiotic relationship" existed so as to subject Harper Hospital to liability pursuant to 42 U.S.C. § 1983.

The Court is therefore not persuaded that defendant Harper Hospital is entitled to an award of attorney fees pursuant to 42 U.S.C. § 1988.

Defendant also seeks an award of attorney fees pursuant to 28 U.S.C. § 1927. Section 1927 provides, "Any attorney . . . who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the Court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct."

For the reasons set forth above, this Court does not find that plaintiff's attorney John C. Kaplansky acted unreasonably or vexatiously. Therefore, defendant's request for an award of attorney fees against Mr. Kaplansky pursuant to 28 U.S.C. §1927 shall be denied.

Harper Hospital also seeks attorney fees pursuant to the Court's "inherent power" to award attorney fees. While the Court recognizes its power to award attorney fees where the unsuccessful party's attorney acted in "bad faith" or "engaged in frivolous conduct" the Court does not believe that the facts presented in this case warrant such an award. *See In re Ruben,* 825 F.2d 977, 983 (6th Cir. 1987). The Court does not conclude that counsel acted in bad faith, nor does the Court conclude that such conduct was "frivolous." Therefore, defendant Harper Hospital is not entitled to an award of attorney fees pursuant to the Court's "inherent power."

For the reasons set forth above, defendant Harper Hospital's motion for attorney fees shall be denied.

Plaintiff's Motion for Attorney Fees

Plaintiff contends that he is entitled to attorney fees pursuant to 42 U.S.C. § 1988.

As previously stated in this Opinion, in order to recover attorney fees under 42 U.S.C. § 1988, the party seeking attorney fees must be the "prevailing party." Although plaintiff acknowledges that his claim against Harper Hospital was dismissed pursuant to the Court's Order of Summary Judgment, plaintiff contends that he is the "prevailing party" because as a result of bringing this action, this litigation acted as a "catalyst" to cause defendant to make changes which were at least, in part, the purpose of this lawsuit. Specifically, plaintiff asserts that he claimed that Dr. Lucia Zamorano was improperly holding herself out as having a Ph.D. degree and that the defendants were allowing her to do so. Plaintiff claims that as a result of this lawsuit, Dr. Zamorano no longer holds herself out as having a Ph.D. Defendant opposes plaintiff's motion for attorney fees contending that plaintiff is clearly not a "prevailing party." Defendant contends that plaintiff did not achieve any of the original objectives of the lawsuit against Harper Hospital.[2] The Court is satisfied that plaintiff is not a prevailing party with respect to any of his asserted claims against Harper

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[2] Defendant points out that nowhere in plaintiff's complaint does he seek to prevent Dr. Zamorano from holding herself out as a Ph.D.

Hospital. Therefore he is not entitled to attorney fees under 42 U.S.C. 1988.

The Court also denies plaintiff attorney fees pursuant to 28 U.S.C. § 1927. As previously indicated, in order to be entitled to attorney fees under § 1927, the Court must be satisfied that counsel acted unreasonably and vexatiously. Plaintiff does not point to any vexatious or unreasonable conduct on behalf of defense counsel and this Court is satisfied that defense counsel's conduct was not unreasonable or vexatious.

For the reasons set forth above, plaintiffs motion for attorney fees shall be denied.

An Order consistent with this Opinion shall issue forthwith.

MAR 30 1998

/s/_____
PATRICK J. DUGGAN
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

[Filed March 31, 1998]

No. 95-CV-73247-DT

DR. DONALD AUSTIN,
Plaintiff,

v.

DR. FERNANDO DIAZ, M.D.,
DR. ROBERT SOKOL, M.D.,
HARPER HOSPITAL, and THE
BOARD OF GOVERNORS OF
WAYNE STATE UNIVERSITY,
Defendants.

ORDER DENYING DEFENDANT HARPER HOSPITAL'S MOTION FOR ATTORNEY FEES AND DENYING PLAINTIFF'S MOTION FOR ATTORNEY FEES

At a session of said Court, held in the U.S. District Courthouse, City of Detroit, County of Wayne, State of Michigan, on March 30, 1998

PRESENT: THE HONORABLE PATRICK J. DUGGAN
U.S. DISTRICT COURT JUDGE

This matter is before the Court on motion for attorney fees brought on by defendant Harper Hospital and a motion for attorney fees brought by plaintiff. For the reasons set forth in an Opinion issued this date,

IT IS ORDERED that defendant Harper Hospital's motion for attorney fees is **DENIED**,

IT IS FURTHER ORDERED that plaintiff's motion for attorney fees is hereby **DENIED**.

/s/_____
PATRICK J. DUGGAN
UNITED STATES DISTRICT JUDGE

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

[Filed July 3, 1996]

No. 95-CR-73247-DT

DR. DONALD AUSTIN, M.D., *Plaintiff,*

v.

DR. FERNANDO DIAZ, M.D., DR. ROBERT SOKOL, M.D., HARPER HOSPITAL, a Michigan non-profit corporation, THE BOARD OF GOVERNORS OF WAYNE STATE UNIVERSITY, jointly and severally, *Defendants.*

OPINION AND ORDER GRANTING DEFENDANT HARPER HOSPITAL AND DR. FERNANDO DIAZ' MOTION FOR SUMMARY JUDGMENT AND GRANTING IN PART DEFENDANTS BOARD OF GOVERNORS OF WAYNE STATE UNIVERSITY, DIAZ AND SOKOL'S MOTION FOR SUMMARY JUDGMENT

At a session of said Court, held in the U.S. District Courthouse, City of Detroit, County of Wayne, State of Michigan on July 3, 1996.

PRESENT: THE HONORABLE PATRICK J. DUGGAN
U.S. DISTRICT COURT JUDGE

Before this Court are motions for summary judgment by the defendants. The present action is one under 42 U.S.C. § 1983. Plaintiff contends that defendants retaliated against him for exercising his rights under the First Amendment of the Constitution. Defendants have moved for summary judgment on various grounds.

I. Board of Governors of Wayne State University

Defendant Board of Governors of Wayne State University ("WSU") contends that it is entitled to Eleventh Amendment Immunity from plaintiff's claims for damages. The Court agrees. The Eleventh Amendment bars suits for damages against the state or its instrumentalities. *Cowan v. University of Louisville School of Med.*, 900 F.2d 936, 940 (6th Cir. 1990). Numerous state universities, including Wayne State University, have been found to be entitled to Eleventh Amendment immunity. *Id.* at 940-41 (University of Louisville); *Coleman v. Wayne State University*, 664 F. Supp. 1082, 1085 (E.D.Mich. 1987) (Wayne State University); *Karmanos v. Baker*, 816 F.2d 258, 259 (6th Cir. 1987) (University of Michigan); *Hutchins v. Board of Trustees of Michigan State University*, 595 F. Supp. 862 (W.D.Mich. 1984) (Michigan State University). The Court therefore concludes that WSU is immune from suit for damages under the Eleventh Amendment.

Plaintiff contends that defendants waived their right to claim Eleventh Amendment immunity because they did not assert immunity as an affirmative defense in their answer. This argument is without merit. Eleventh Amendment Immunity is not waived even when raised for the first time on appeal.

Plaintiff's also cites to Michigan's governmental immunity statute, M.C.L.A. §691.1407, to support his position that defendants waived their rights to claim immunity. Again, this is unpersuasive. The Supreme Court has stated that it will only find Eleventh Amendment Immunity to be waived where the United States Congress has shown its intention to abrogate immunity "by the most express language or by such overwhelming implications from the text as [will] leave no room for any other reasonable construction." *Edelman v. Jordan,* 415 U.S. 651, 673, 94 S.Ct. 1347, 1361.

Since WSU is entitled to immunity and immunity has not been waived, plaintiff's claim for money damages against WSU is dismissed.

II. Doctor Sokol and Doctor Diaz

Eleventh Amendment Immunity applies not only to suits against the state but also to state officials acting in their official capacity. *See Will v. Michigan Dep't of State Police,* 109 S.Ct. 2304, 2312. It is undisputed that Sokol is being sued for actions only taken in his official capacity. Therefore, plaintiff's claim for damages against Sokol is dismissed.

Plaintiff's complaint purports to sue Diaz in his capacity as a representative of Harper Hospital, in his capacity as a representative of WSU, and individually in his personal capacity. The Court will deal with plaintiff's claims against Diaz as a representative of Harper in section III, below.

Plaintiff's claims for money damages against Diaz as a representative of WSU are claims against a state official acting in his official capacity and are thus barred by the Eleventh Amendment. *See Id.*

Diaz is also being sued for actions taken in his "individual" capacity. *See* Comp. at ¶16, 16e. Defendant Diaz' motion for summary judgment for actions taken in his individual capacity is denied.

III. Harper Hospital and Doctor Diaz in his capacity as representative of Harper

To sustain a claim under 42 U.S.C. §1983, plaintiff must prove that he was denied a right, privilege or immunity secured by the Constitution or law of the United States by a person acting under color of law. §42 U.S.C. §1983; *Flagg Bros., Inc. v. Brooks,* 436 U.S. 149, 155 (1978). Harper Hospital (and Diaz in his capacity as representative of Harper) contends that it was not a state actor for the purposes of liability under §1983.

A defendant's conduct constitutes "state action" only when the alleged infringement of a federal right is "fairly attributable to the state." Plaintiff contends the state action

requirement is met under the "symbiotic relationship" test, also know as the "nexus" test.

> Under the symbiotic relationship or nexus test, the action of a private party constitutes state action when there is a sufficiently close nexus between the state and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the state itself. Merely because a business is subject to state regulation does not by itself covert its action into state action. Rather, it must be demonstrated that the state is intimately involved in the challenged private conduct in order for that conduct to be attributed to the state for purposes of section 1983.

Wolotsky v. Huhn, 960 F.2d 1331, 1335 (6th Cir. 1992).

Though plaintiff does not contend the nexus to exist due to state regulation, plaintiff attempts to establish "state action" in this case by pointing to the following:

1. An affiliation agreement between WSU and Harper Hospital. Ex. 1.

2. A memorandum of understanding between WSU and the Detroit Medical Center Member Institutions, of which Harper is one. Ex. 1.

3. The articles of Incorporation of the DMC/WSU Health System. Ex. 2.

The Court agrees with plaintiff that these documents give support to plaintiff's contention that there is significant interrelationship between Harper and WSU. However, the Court does not believe this is the relevant question. Rather, plaintiff has the burden of proving that these agreements establish that the State, i.e., WSU was "intimately involved in the challenged private conduct. . . ." Wolotsky, 960 F.2d at 1335. Plaintiff has not done so.

The "challenged private conduct" for which plaintiff complains against Harper are as follows:

1. Harper dismissed him as Vice Chief of the Department of Neurological Surgery allegedly in response to plaintiff having expressed his opinion about Dr. Diaz.

2. Harper dismissed him from the Credentials Committee after he expressed some concerns about granting surgical privileges to a certain doctor.

Comp. at ¶16b, c.

The agreements cited by plaintiff do not purport to grant Wayne State University any input whatsoever into the election of the Vice Chief of Neurological Surgery or in deciding who participates on the credentials committee. In fact, plaintiff has pointed to no evidence to suggest that the state, i.e. WSU, was "intimately involved in the challenged conduct." In response to a motion for summary judgment, plaintiff cannot rest on its pleadings. Instead, plaintiff must come forth with probative evidence to show the existence of genuine issues of material fact regarding his claim. It is clear to this Court that plaintiff has not met this burden. Therefore,

Harper Hospitals and Diaz' (as a representative of Harper) motion for summary judgment will be granted.

IV. Plaintiff's claim for injunctive relief

Defendants have also moved for summary judgment on plaintiff's claims for injunctive relief. At this time, the Court is not prepared to rule, as a matter of law, that plaintiff is not entitled to such relief. Defendants motion will therefore be denied.

For the reasons set forth above,

IT IS ORDERED that plaintiff's claims for damages against defendant the Board of Governors of WSU and plaintiff's claims against defendants Diaz and Sokol as representatives of WSU are **DISMISSED**.

IT IS FURTHER ORDERED that defendants Harper Hospital and Diaz' (as a representative of Harper) motion for summary judgment is **GRANTED** and defendant Harper Hospital is **DISMISSED** from this action.

IT IS FURTHER ORDERED that defendant Diaz' motion for summary judgment is **DENIED** with respect to plaintiff's claims against Diaz in his individual capacity.

IT IS FURTHER ORDERED that defendants' motion for summary judgment on plaintiff's claim for injunctive relief is **DENIED**.

/s/_____
PATRICK J. DUGGAN
UNITED STATES DISTRICT JUDGE

APPENDIX D

EXCERPT FROM EASTERN DISTRICT OF MICHIGAN COURT'S FINDINGS OF FACT - PLAINTIFF'S FIRST AMENDMENT RIGHTS INVOKES PUBLIC CONCERN

AUSTIN v. DIAZ

Detroit, Michigan
Tuesday, August 27, 1996
At about 3:50 p.m.
(Excerpt)

MR. BERNARD: I'm not explaining myself well enough. Let me try one more time, please.

As I understand the case law, which I have cited in my trial brief, you have to determine whether the plaintiff's constitutional rights were so clearly established that anyone -- that when the alleged misconduct was committed that an official in Dr. Diaz's position would have understood that what he was doing violated the plaintiff's rights.

And now, so the -- so applying that to this case, the issue is, would someone in Dr. Diaz's position have understood that by leaving Dr. Austin out of the brochure, he was violating the plaintiff's rights?

THE COURT: No. Did he know that he violated his rights if he deliberately left him out of the brochure because

Dr. Austin had exercised his First Amendment rights. I don't know where you're going with -- he's admitted that he –

MR. BERNARD: I see.

THE COURT: Clearly established law. He knew that it was a violation of the law to deliberately leave Dr. Austin out simply because Dr. Austin exercised his First Amendment rights.

MR. BERNARD: I see the Court's reasoning. And I'll end my argument on qualified immunity there.

THE COURT: All right. With respect to the public concern, I think that the -- I think the testifying for plaintiffs in a medical malpractice case certainly has a public concern aspect to it that plaintiffs who have been injured through the malpractice of a physician certainly ought to have the right to successfully seek redress in the courts, and to interfere with that right by discouraging doctors from testifying, I think involves public concern.

I certainly think that a physician in a hospital who has reason to believe that another individual who may be given full staff privileges is incompetent has a right, and I think a duty to speak out to protect the public, and certainly if he's on the credentials committee, a right to speak out. So I think the speech involved here has sufficient public concern aspect to it to deny that aspect.

Do you have anything more?

MR. BERNARD: No, Your Honor.

MR. KAPLANSKY: Let me talk to Mr. Kaplansky. Let's deal, Mr. Kaplansky, with some of the specific arguments that Mr. Bernard has raised.

First of all, he has indicated, for example, that you should not be able to seek damages for the malpractice subsidy because either that denial or that deprivation of that subsidy was caused by the exercise, that is, his -- the policy of precluding Dr. Austin from testifying for plaintiffs. And if it was caused by that, then you're barred by the statute of limitations and you can't show that it was caused by the brochure. I don't know if there's any evidence that he even suggested that he didn't get the malpractice subsidy because of the brochure.

So tell me why you believe the evidence supports your right to seek damages for the loss of the malpractice subsidy.

MR. KAPLANSKY: My recollection of the issue when it was raised earlier in the pretrial motions was that there was case law indicating that it was a continuing tort.

(Excerpt concluded)

APPENDIX E

CONSTITUTIONAL PROVISIONS STATUTES, RULES:

CONSTITUTION OF THE UNITED STATES OF AMERICA

Amendment I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment VII

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

Amendment XIV

SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without the due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

SECTION 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxes. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, 15 and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion

which the number of such male citizens twenty-one years of age in such State.

SECTION 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, or support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a of two-thirds of each House, remove such disability.

SECTION 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall nol be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

SECTION 5. The Congress shall have power to enforce, by appropriate legislation, tile provisions of this article.

Title 28

§ 2101. Supreme Court time for appeal or certiorari; docketing; stay

(a) A direct appeal to the Supreme Court from any decision under section 1253 of this title, holding unconstitutional in whole or in part, any Act of Congress, shall be taken within thirty days after the entry of the interlocutory or final order, judgement or decree. The record shall be made up and the case docketed within sixty days from the time such appeal is taken under rules prescribed by the Supreme Court.

(b) Any other direct appeal to the Supreme Court which is authorized by law, from a decision of a district court in any civil action suit or proceeding, shall be taken within thirty days from the judgement, order or decree, appealed from, if interlocutory, and within sixty days if final.

(c) Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment order or decree. A justice of the Supreme Court for good cause shown, may extend the time for applying for a writ of certiorari for a period not exceeding sixty days.

(d) The time of for appeal or application for a writ of certiorari to review the judgment of a State court in a criminal case shall be as prescribed by rules of the Supreme Court.

(e) All application to the Supreme Court for a writ of certiorari to review a case before judgment has been rendered in the court of appeals may be made at any time before judgment.

(f) In any case in which the final judgment or decree of any court is subject to review by the Supreme Court on writ of certiorari, the execution and enforcement of such judgment or decree may be stayed for a reasonable time to enable the party aggrieved to obtain a writ of certiorari from the Supreme Court. The stay may be granted by a judge of the court rendering the judgment or decree or by a justice of the Supreme Court, and may be conditioned on the giving of security, approved by such judge or justice, that if the aggrieved party fails to make application for such writ within the period allotted thereof or fails to obtain an order plea good in the Supreme Court, he shall answer for all damages and costs which the other party may sustain by reason of the stay.

(g) The lime for application for a writ of certiorari to review a decision of the United States Court of Appeals for the Armed Forces shall be as prescribed by rules of the Supreme Court.

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§1254. Courts of appeals; certiorari; certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

(2) By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy.

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§1331. Federal question

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

Title 42 § 1983
Civil action for deprivation of rights

Every person who, under color of any statue, ordinance, regulation, custom, or usage, of any State or Territory or the District of Colombia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

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§1988. Proceedings in vindication of civil rights

(a) Applicability of statutory and common !aw

The jurisdiction in civil and criminal matters conferred on the district courts by the provision of titles 13, 24 and 70 of the Revised Statutes of titles 13, 24, and 70 of the Revised Statutes for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in remedies and punish offenses against law, the common law, a modified and changed by the constitution and statues of the State

wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty.

(b) Attorney's fees

In any action or proceeding to enforce a provision of sections 1981, 1981a, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318 [20 U.S.C. 1681 et seq.] the Religious Freedom Restoration Act of 1993 [42 U.S.C. 2000bb et seq.], Title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d et seq.] or section 13891 of this title, 1 the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

(c) Expert fees

In awarding an attorney's fee under subsection (b) of this section in any action of proceeding to enforce a provision of section 1982 or 1981a of this title, the court, in its discretion, may include expert fees as part of the attorney's fee.

Professional Review Activities
§ 11101. Findings

The Congress finds the following:

(1) The increase occurrence of medical malpractice and the need to improve the quality of medical care have become nationwide problems that warrant greater efforts than those that can be undertaken by any individual State.

(2) There is a national need to restrict the ability of incompetent physicians to move from State to State without disclosure or discovery of the physician's previous damaging or incompetent performance.

(3) This nationwide problem can be remedied through effective professional peer review.

(4) The threat of private money damage liability under Federal laws, including treble damage liability under Federal antitrust law, unreasonably discourages physicians from participating in effective professional peer review.

(5) There is an overriding national need to provide incentive and protection for physicians engaging in effective professional peer review.

FEDERAL RULES OF CIVIL PROCEDURE

Rule 49.Special Verdicts and Interrogatories.

(a) Special Verdicts. The court may require a jury to return only a special verdict in the form of a special written finding upon each issue of fact. In that event the court may submit to the jury written questions susceptible of categorical or other brief answer or may submit written forms of the several special findings which might properly be made under the pleadings and evidence; or it may use such other method of submitting the issues and requiring the written findings thereon as it deems most appropriate. The court shall give to the jury such explanation and instruction concerning the matter thus submitted as may be necessary to enable the jury to make its findings upon each issue. If in so doing the court omits any issue of fact raised by the pleadings or by the evidence, each party waives the right to a trial by jury of the issue so omitted unless before the jury retires the party demands its submission to the jury. As to an issue omitted without such demand the court may make a finding; or, if it fails to do so, it shall be deemed to have made a finding in accord with the judgment on the special verdict.

(b) General Verdict Accompanied by Answer to Interrogatories. The court may submit to the jury, together with appropriate forms for a general verdict, written interrogatories upon one or more issues of fact the decision of which is necessary to a verdict. The court shall give such explanation or instruction as may be necessary to enable the jury both to make answers to the interrogatories and to render a general verdict, and the court shall direct the jury both to make written answers and to render a general verdict. When

the general verdict and the answers are harmonious, the appropriate judgment upon the verdict and answers shall be entered pursuant to Rule 58. When the answers are consistent with each other but one or more is inconsistent with the general verdict, judgment may be entered pursuant to Rule 58 in accordance with the answers, notwithstanding the general verdict, or the court may return the jury for further consideration of its answers and verdict or may order a new trial. When the answers are inconsistent with each other and one or more is likewise inconsistent with the general verdict, judgment shall not be entered, but the court shall return the jury for further consideration of its answers and verdict or shall order a new trial.

FEDERAL RULES OF CIVIL PROCEDURE

Rule 56. Summary Judgment

(a) For Claimant. A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in the party's favor upon all or any part thereof.

(b) For Defending Party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part thereof.

(c) Motion and Proceedings Thereon. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability along although there is a genuine issue as to the amount of damages.

(d) Case Not Fully Adjudicated on Motion. If on motion under this rule judgment is not rendered upon the whole case

or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) Form of Affidavits; Further Testimony; Defense Required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or part thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not respond, summary judgment, if appropriate, shall be entered against the adverse party.

(f) When Affidavits are Unavailable. Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had to may make such other order as is just.

(g) Affidavits Made in Bad Faith. Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused the other party to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

§ 5. University of Michigan, Michigan State University, Wayne State University; controlling boards

Sec. 5. The regents of the University of Michigan and their successors in office shall constitute a body corporate known as the Regents of the University of Michigan; the trustees of Michigan State University and their successors in office shall constitute a body corporate known as the Board of Trustees of Michigan State University; the governors of Wayne State University and their successors in office shall constitute a body corporate known as the Board of Governors of Wayne State University. Each board shall have general supervision of its institution and the control and direction of all expenditures from the institution's funds. Each board shall, as often as necessary, elect a president of the institution under its supervision. He shall be the principal executive officer of the institution, be ex-officio a member of the board without the right to vote and preside at meetings of the board. The board of each institution shall consist of eight members who shall hold office for terms of eight years and who shall be elected as provided by law. The governor shall fill board vacancies by appointment. Each appointee shall hold office until a successor has been nominated and elected as provided by law.

MCL 390.641. Wayne state university; establishment, board of governors

Sec. 1. There is hereby established a state institution of higher education to be located in the industrial area of southeastern Michigan. The institution shall be maintained by the state of Michigan, and its facilities shall be made equally available and upon the same basis to all qualified residents of this state. The conduct of its affairs and control of its property shall be vested in a board of governors, the members of which shall constitute a body corporate known as the "board of governors of Wayne state university," hereinafter referred to as "the board," with the right as such of suing and being sued, of adopting a seal, and altering the same.

MCL 333.16221. Investigation of licensee; grounds

Sec. 16221. The department may investigate activities related to the practice of a health profession by a licensee, a registrant, or an applicant for licensure or registration. The department may hold hearings, administer oaths, and order relevant testimony to be taken and shall report its findings to the appropriate board or appropriate task force. The board shall proceed under section 16226[1] if the board finds that any of the following grounds exist:

(a) A violation of general duty, consisting of negligence or failure to exercise due care, including negligent delegation to or supervision of employees or other individuals, whether or not injury results, or any conduct, practice, or condition which impairs, or may impair, the ability to safely and skillfully practice the health profession.

(b) Personal disqualifications, consisting of any of the following:

(*i*) Incompetence.

(ii) Substance abuse as defined in section 6107.[2]

(iii) Mental or physical inability reasonably related to and adversely affecting the licensee's ability to practice in a safe and competent manner.

(iv) Declaration of mental incompetence by a court of competent jurisdiction.

(*v*) Conviction of a misdemeanor or felony reasonably related to and adversely affecting the licensee's ability to practice in a safe and competent manner. A certified copy of the court record shall be conclusive evidence of the conviction.

(vi) Lack of good moral character.

(vii) Conviction of a criminal offense under sections 520a to 520*l* of the Michigan penal code, Act No. 328 of the Public Acts of 1931, being sections 750.520a to 750.520*l* of the Michigan Compiled Laws. A certified copy of the court record shall be conclusive evidence of the conviction.

(viii) Conviction of a violation of section 492a of the Michigan penal code, Act No. 328 of the Public Acts of 1931, being section 750.492a of the Michigan Compiled Laws. A certified copy of the court record shall be conclusive evidence of the conviction.

(ix) Conviction of a misdemeanor or felony involving fraud in obtaining or attempting to obtain fees related to the practice of a health profession. A certified copy of the court record shall be conclusive evidence of the conviction.

(c) Prohibited acts, consisting of any of the following:

(*i*) Fraud or deceit in obtaining or renewing a license.

(ii) Permitting the license to be used by an unauthorized person.

(iii) Practice outside the scope of a license.

(*iv*) Obtaining, possessing, or attempting to obtain or possess a controlled substance as defined in section 7104[3] or a drug as defined in section 7105[4] without lawful authority; or selling, prescribing, giving away, or administering drugs for other than lawful diagnostic or therapeutic purposes.

(d) Unethical business practices, consisting of any of the following:

(*i*) False or misleading advertising.

(*ii*) Dividing fees for referral of patients or accepting kickbacks on medical or surgical services, appliances, or medications purchased by or in behalf of patients.

(*iii*) Fraud or deceit in obtaining or attempting to obtain third party reimbursement.

(e) Unprofessional conduct, consisting of any of the following:

(*i*) Misrepresentation to a consumer or patient or in obtaining or attempting to obtain third party reimbursement in the course of professional practice.

(*ii*) Betrayal of a professional confidence.

(*iii*) Promotion for personal gain of an unnecessary drug, device, treatment, procedure, or service.

(*iv*) Directing or requiring an individual to purchase or secure a drug, device, treatment, procedure, or service from another person, place, facility, or business in which the licensee has a financial interest.

(f) Failure to report a change of name or address within 30 days after the change occurs.

(g) A violation, or aiding or abetting in a violation, of this article or of rules promulgated under this article.

(h) Failure to comply with a subpoena issued pursuant to this part.

(i) Failure to pay an installment of an assessment levied pursuant to section 2504 of the insurance code of 1956, Act No. 218 of the Public Acts of 1956, as amended, being section 500.2504 of the Michigan Compiled Laws, within 60 days after notice by the appropriate board.

(j) A violation of section 17013 or 17513.[5]

Amended by P.A.1986, No. 174, § 1, Imd. Eff. July 7, 1986; P.A. 1986, No. 195, § 1, Imd. Eff. July 8, 1986; P.A.1986, No. 319, § 1, Imd. Eff. Dec. 26, 1986; P.A.1987, No. 178, § 1, Imd. Eff. Nov. 19, 1987; P.A.1989, No. 15, § 1, Imd. Eff. May 15, 1989.

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

[Filed August 11, 1995]

No.

DR. DONALD AUSTIN, M.D.
Plaintiff,

v.

DR. FERNANDO DIAZ, M.D.;
DR. ROBERT SOKOL, M.D.;
HARPER HOSPITAL, a Michigan non-profit corporation; THE BOARD OF GOVERNORS OF WAYNE STATE UNIVERSITY; all jointly and severally.
Defendants.

COMPLAINT AND JURY DEMAND
JURISDICTION

Now comes Plaintiff, by and through his attorney, John C. Kaplansky, and for his complaint against the defendants states as follows:

1. Plaintiff Dr. Donald Austin, M.D., is a neurological surgeon in private practice in the City of Detroit, on the medical staff of Harper Hospital, and is a Clinical Associate Professor in the Department of Neurosurgery, Wayne State University School of Medicine, Detroit, Michigan.

2. Defendant Dr. Fernando Diaz, M.D., is a neurological surgeon, and is currently professor and chairman of the neurological surgery department of the Wayne State University School of Medicine and is also chairman of the neurological surgery department of Harper Hospital, Detroit, Michigan.

3. Defendant Dr. Robert Sokol, M.D., is the Dean of the Wayne State University Medical School, Detroit, Michigan.

4. Defendant Board of Governors of Wayne State University is a state agency established by the legislature of the State of Michigan.

5. Harper Hospital is a Michigan non-profit corporation, and at all times relevant to this Complaint acts and acted as the teaching facility of the Wayne State University Medical School

6. The cause of action complained of herein alleges First Amendment violations actionable under 42 USC 1983.

7. The Federal District Court has jurisdiction over the subject matter alleged herein pursuant to the provisions of

28 USC 1331 and 1343.

8. That in addition to equitable relief the damages claimed herein are in excess of Fifty Thousand ($50,000) Dollars exclusive of interest, costs, and attorney fees.

COUNT I

9. That since 1963, plaintiff Dr. Donald Austin has been on the medical staff of Harper Hospital, Detroit, Michigan, and since 1969, plaintiff has also been on the academic faculty of the Wayne State University College of Medicine, in the neurological surgery department, where he currently serves as a Clinical Associate Professor of Neurosurgery in the Department of Neurosurgery.

10. That plaintiff has and continues to perform all duties expected of him as a Clinical Associate Professor.

11. That plaintiff receives and has received a valuable benefit as a result of his service as an Associate Professor on the faculty of the Wayne State University Medical School.

12. That in 1990, Dr. Fernando Diaz became the Chairman of the Department of Neurological Surgery of the Wayne State University Medical School, and also became the Chairman of the Harper Hospital Department of Neurological Surgery.

13. That in his capacity as professor and Chairman of the Wayne State University Medical School Department of Neurosurgery, Dr. Diaz has exercised the powers and policy

making decisions delegated to him by Dr. Robert Sokol, in his capacity as Dean of the Wayne State University School of Medicine, as delegated to Dr. Sokol by the Wayne State University Board of Governors.

14. That in his capacity as Chairman of the Harper Hospital Department of Neurosurgery, Dr. Diaz has exercised the powers and policy making decisions delegated to him by the administration of Harper Hospital, and has acted with the consent of the administration.

15. That at all times relevant to the incidents set forth in this complaint, Harper Hospital has been in a symbiotic relationship with the Wayne State University school of Medicine acting as the teaching facility for the Wayne State University School of Medicine, from which it receives compensation and/or other benefits, and has acted as a state agency with respect to the allegations in this complaint.

16. That commencing in 1990, and continuing to the present, Dr. Fernando Diaz, individually, and in his capacity as Chairman of the departments of neurological surgery for both Harper Hospital and Wayne State University Medical School, has engaged in a pattern of behavior and conduct in direct response to and in retaliation for Dr. Donald Austin having exercised his rights of free speech guaranteed under the First Amendment of the Constitution of the United States, causing harm and damages to Dr. Donald Austin, including but not limited to the following:

a. That commencing in March of 1990, Dr. Diaz, in his capacity as Chairman of the Wayne State University Medical

School Department of Neurosurgery, instituted a policy prohibiting members of the department from participating as expert witnesses on behalf of plaintiffs, only, in medical malpractice litigation. Dr. Diaz attempted to remove Dr. Austin from the faculty for refusing to refrain from exercising his First Amendment rights of free speech to testify on behalf of plaintiffs, and the removal proceeding was terminated only after the University was threatened with legal proceedings. Dr. Austin was reinstated but no longer received medical malpractice insurance premium assistance.

b. That during December of 1992, the Harper Hospital administration caused an investigation to be conducted into Dr. Diaz's administrative abilities as a result of various deficiencies in his administration of the Harper Hospital, and Medical School, departments of neurosurgery. The investigation was performed by Dr. James Robertson, who interviewed Dr. Austin as well as other physicians in the neurosurgery department. Dr. Robinson's report was critical of Dr. Diaz, and recommended certain changes be made. Approximately three (3) days after Dr. Austin was interviewed, Dr.

Diaz dismissed Dr. Austin as Vice Chief of the Department of Neurological Surgery, a position which he had held for eighteen years. The removal was in violation of hospital bylaws and in response to Dr. Austin having expressed his opinions about Dr. Diaz, as requested by Dr. Robertson.

c. That during and prior to 1994, in his capacity as a member of the Harper Hospital Credentials Committee, Dr. Austin objected to allowing full surgical privileges at Harper Hospital to a physician brought to the neuro surgical department by Dr. Diaz, for the reason that the particular surgeon had only limited neurosurgical training, was not and could not be board certified, did not hold a doctorate degree as professed, was denied full privileges at another area hospital, and was only allowed restricted privileges at a second area hospital. In retaliation for Dr. Austin having spoken out and objecting to allowing full and unrestricted privileges to the physician endorsed by Dr. Diaz, Dr. Diaz dismissed Dr. Austin from the Harper Hospital Credentials Committee.

d. That in further retaliation for Dr. Austin having objected to the unrestricted appointment of the unqualified physician to the Harper Hospital staff, Dr. Austin's name disappeared from internal University neurosurgical department communications listing the faculty of the neurological surgery department, and from external, marketing, and publicity documents listing the faculty of the department.

e. That in March of 1995, individually, in his capacity as Professor and Chairman of the Waybe State University Medical School Department of Neurological Surgery, and on information and belief in his capacity as chairman of the Harper Hospital Department of Neurosurgery, Dr. Diaz, in conjunction with Harper Hospital, caused an advertising and marketing brochure to be distributed throughout the Detroit Medical Center (DMC) service area, believed to be the entire State of Michigan, which brochure described the high quality of skills and state of the art facility available through the Wayne State University department of neurological surgery and Harper Hospital, which brochure was distributed for the purpose of causing

> physicians throughout the DMC service area to refer patients to the WSU Department of Neurosurgery and Harper Hospital. The brochure included a list of the WSU Medical School Neurological Surgery faculty including physicians, physician assistants, stereotactic support, program director, neuroscience nurses, and biomechanics research. The only faculty member excluded from the brochure was plaintiff Dr. Donald Austin.

17. That Dr. Austin protested the omission of his name as a faculty member from the brochure to Dr. Robert Sokol, Dean of the WSU school of medicine, who refused and continues to refuse to take any remedial action.

18. That Dr. Donald Austin's name was intentionally and maliciously omitted from the brochure openly and publicly distributed to other physicians in the Detroit Medical Center Service area in retaliation for Dr. Donald Austin having exercised his rights of free speech in objecting to allowing unrestricted staff privileges to the particular physician, criticizing Dr. Diaz's performance during an investigation conducted at the request of hospital administration, and for continuing to offer expert testimony on behalf of plaintiffs in medical malpractice cases.

19. That as a direct and proximate cause of Dr. Diaz's intentional, malicious, and reckless conduct and actions in retaliation for Dr. Austin having exercised his

rights of free speech, Dr. Austin has been de facto dismissed as a faculty member of the medical school as regards communications and public relations within and outside the medical school, and has been cast into a false light as to his status at the Wayne State University Medical School, although he still serves as a faculty member.

20. That as a direct and proximate cause of Dr. Diaz's conduct, and Dr. Austin's name being publicly omitted from the marketing brochure distributed throughout the state, Dr. Austin has suffered injury and damages including but not limited to persons being led to believe that he had retired, become disabled, dead, or was otherwise no longer available for consultations or to accept referrals of patients, and was no longer a part of the faculty of the Wayne State University School of Medicine Department of Neurosurgery, which is untrue.

21. That plaintiff Dr. Donald Austin has been intentionally deprived of a benefit in which he had and has substantial rights and property interests in retaliation for his exercising his rights of free speech, in violation of Article I, Section 5 of the Michigan Constitution and the First Amendment to the Constitution of the United States.

22. That plaintiff Dr. Donald Austin has been deprived of a benefit in which he had a substantial right and property interest without due process of law in violation of Article I, Sec. 17 of the Michigan Constitution, and the 14th Amendment to the Constitution of the United States.

23. That plaintiff Dr. Donald Austin has suffered injury and damage to his professional reputation, medical

practice, and standing in the community, in retaliation for having exercised his right of free speech.

24. That all of the issues upon which plaintiff Dr. Donald Austin spoke and for which he has suffered and sustained retaliation, have concerned matters of public interest, matters of concern with respect to the Wayne State University School of Medicine Department of Neurological Surgery and its interactions with Harper Hospital as the teaching facility of the medical school, and the quality of health care delivered by the facilities.

25. That plaintiff Dr. Donald Austin had and continues to have an absolute right to testify as an expert on behalf of an injured plaintiff in a medical malpractice case, to respond to an administrative investigation, to voice his opinion as a member of the hospital Credentials Committee, and to report a violation or suspected violation of a law.

26. That at all times relevant to the incidents and events set forth in this complaint, Dr. Fernando Diaz was acting under color of law.

27. That Dr. Robert Sokol ratified and affirmed all of Dr. Diaz's actions towards Dr. Donald Austin, and at all times relevant to the incidents and events set forth in this complaint, Dr. Robert Sokol was acting under color of law.

28. That at all times relevant to the incidents and events set forth in this Complaint, both Drs. Diaz and Sokol were acting pursuant to the authority vested in him and them by the Board of Governors of Wayne State University.

29. That the retaliatory actions of Dr. Fernando Diaz against Dr. Donald Austin for plaintiff having exercised his rights of free speech, are a violation of 42 USC 1983, and are against public policy.

30. That Dr. Robert Sokol's having ratified and affirmed the retaliatory actions of Dr. Diaz are a violation of 42 USC 1983, and are against public policy.

31. That the Defendant Board of Governors of Wayne State University, have ratified the actions of Drs. Diaz and Sokol, and is responsible for the actions of its agents and employees Drs. Fernando Diaz and Dr. Robert Sokol.

32. That Harper Hospital in its capacity as the teaching facility of the Wayne State University Medical School, is responsible for the actions of its agents and employees Drs. Fernando Diaz and Dr. Robert Sokol.

WHEREFORE, Plaintiff Dr. Donald Austin prays that his Honorable Court enter its Judgment in favor of plaintiff and against the defendants, and Order the defendants to initiate remedial action with respect to correcting the omission plaintiff's name and title from the Wayne State University School of Medicine Department of Neurosurgery faculty list, to enjoin the defendants from excluding plaintiff's name from future internal, external, public communications and marketing materials identifying the Wayne State University Medical School Neuro Surgical Department Faculty, to provide plaintiff with whatever further relief is equitable under the circumstances, and to further award to plaintiff compensatory and punitive damages in an amount in excess of Fifty Thousand ($50,000) Dollars, such as Plaintiff shows

himself to be entitled, plus interest and costs, and reasonable attorney fees. Plaintiff further prays that this Honorable Court award Plaintiff reasonable attorney fees as provided in 42 USC 1988.

/s/_____
JOHN C. KAPLANSKY (P23354)
Attorney for Plaintiff
30200 Telegraph, Ste. 440
Bingham Farms, MI 48025
(810) 258-9444

DATED: August 11, 1995

DEMAND FOR TRIAL BY JURY

Plaintiff Dr. Donald Austin hereby demands trial by jury in the above encaptioned cause.

/s/_____
JOHN C. KAPLANSKY (P23354)

APPENDIX G

ARTICLES OF INCORPORATION
OF
DMC/WSU HEALTH SYSTEM

[Filed December 26, 1984]

Pursuant to the provisions of Act 162, Public Acts of 1982, the undersigned Corporation executes the following Articles:

ARTICLE I - NAME

The name of the Corporation is DMC/WSU HEALTH SYSTEM.

ARTICLE II - PURPOSE

The Corporation is organized for the following purposes:

A. To provide for the development, planning and implementation of health and health-related services and activities, as well as supporting and ancillary activities, including long-range and strategic planning and medical education and research activities, and

B. To provide or further other charitable, scientific and educational activities,

toward the purpose of enabling the Corporation, together with the Medical Center institutions (Children's Hospital of Michigan, Detroit Receiving Hospital and University Health Center, Harper-Grace Hospitals, Hutzel Hospital, Rehabilitation Institute, Inc., and Wayne State University) and their affiliated entities to fulfill their collective mission, which is:

> To be a cohesive, preeminent academic health center evidencing the interdependent relationship of Wayne State University and the other Medical Center Institutions and integrating clinical service, education and research; and
>
> To maintain centers of excellence; and
>
> To provide high quality primary, secondary and tertiary care within the framework of an integrated, synergetic health care delivery system.

The Corporation is further organized:

A. To further any and all charitable, scientific and educational activities in which the Medical Center institutions now are or hereafter may become engaged, in carrying out their respective missions, as long as the Medical Center institutions are organizations described in Section 501(c)(3) and Sections 509(a)(1) or (a)(2) of the Internal Revenue Code of 1954, as amended, or comparable provisions of subsequent legislation (the "Code");

B. To facilitate the achievement of the individual missions of the Medical Center institutions and their affiliated entities, consistent with the collective mission; and

C. To otherwise operate exclusively for the benefit of, to perform the functions of, and to carry out any of the purposes of the Medical Center institutions.

in furtherance of the foregoing but not by way of limitation, the Corporation is authorized:

A. To acquire, purchase, own, maintain, hold, use, sell, convey, manage, exchange, assign, transfer, mortgage, lease, sublease or rent real and personal property of every kind and nature;

B. To loan, borrow, manage, contribute, donate, give and invest funds;

C. To accept, receive and hold in trust or otherwise, contributions, gifts, legacies, grants, donations, bequests, devises and benefactions which may be left, made or given to the Corporation;

D. To receive and administer assets for purposes of promoting and participating in activities for the education and training of professional and paraprofessional personnel and for purposes of conducting and promoting medical and scientific research to reduce morbidity and mortality and improve patient care and public health;

E. To conduct activities, either directly, through related organizations or in cooperation with other

organizations exempt from tax under Section 501(c)(3) of the Code, in order to raise funds to further the purposes of the Corporation and the Medical Center institutions; and

F. To take all such actions and do all such things as may be necessary or desirable to accomplish the foregoing purposes within the restrictions and limitations of these Articles of Incorporation, the Bylaws of the Corporation and applicable law.

Notwithstanding any other provision of these Articles of Incorporation, no part of the earnings of the Corporation shall inure to the benefit of any private individual (except that reasonable compensation may be paid for services rendered to the Corporation affecting one or more of its purposes), no substantial part of the activities of the Corporation shall be to carry out propaganda or to otherwise attempt to influence legislation, the Corporation shall not participate or intervene in any political campaign on behalf of any candidate for public office (by the publication or distribution of statements or otherwise), in violation of any provisions applicable to corporations exempt from federal income tax under Section 501(c)(3) of the Code, and the Corporation shall not carry on any activity not permitted to be carried on by a corporation exempt from federal income tax under Section 501(c)(3) of the Code, or a corporation, contributions to which are deductible under Section 170(c)(2) of the Code, or an organization described in Section 509(a)(3) of the Code.

ARTICLE III - ORGANIZATION

The Corporation is organized on a membership basis.

A description and statement of value of the assets of the Corporation are as follows:

Real Property	None
Personal Property	$100.00 (cash and cash equivalents)

The Corporation is to be financed by dues and transfers of funds from its subsidiaries and affiliates, through gifts, donations, contributions, legacies, bequests, devises, benefactions and other voluntary transfers of property, and through reimbursement of costs of services provided to subsidiaries and affiliates, fees and charges for services, receipts from parties serviced by the Corporation and other sources of revenue received from the operations of the Corporation.

ARTICLE IV - REGISTERED OFFICE AND RESIDENT AGENT

The address of the registered office of the Corporation, as well as the Corporation's mailing address, is 4201 St. Antoine, Detroit, Michigan 48226.

The name of the resident agent at the registered office is Robert M. Surdam.

ARTICLE V - INCORPORATORS

The names and addresses of the incorporators are as follows:

Children's Hospital of Michigan, 3901 Beaubien, Detroit, Michigan 48201

Detroit Receiving Hospital and University Health Center, 4201 St. Antoine, Detroit, Michigan 48201

Harper-Grace Hospitals, 3990 John R, Detroit, Michigan 48201

Hutzel Hospital, 4707 St. Antoine, Detroit, Michigan 48201

Rehabilitation Institute, Inc., 261 Mack, Detroit, Michigan 48201

Wayne State University, Mackenzie Hall, Detroit, Michigan 48202

ARTICLE VI - DISSOLUTION

Upon dissolution of the Corporation or the winding up of its affairs, the assets of the Corporation shall be distributed exclusively to the Medical Center institutions, on such basis as the Board of Trustees of the Corporation shall direct, if such institutions are then existing and qualified under the provisions of Section 501(c)(3) of the Code, or if any or all of such institutions are not so existing and qualified, to such of them as are, or to such other charitable, scientific or educational organizations which then qualify under the provisions of Section 501(c)(3) of the Code, as the Board of Trustees of the Corporation shall direct.

ARTICLE VII - BYLAWS

The Bylaws of the Corporation shall govern the membership, qualifications, term of office, manner of election and removal, time and place of meetings and powers and duties of the members and the Board of Trustees of the Corporation. The Bylaws may be amended or repealed, or new Bylaws adopted, only by the Board of Trustees of the Corporation, except that any provision regarding the composition of the Board of Trustees or the number of persons who shall serve as Trustees shall be subject to approval by the members of the Corporation. Thirty days prior written notice shall be provided to a hospital subsidiary Medical Center institution prior to any amendment of the Bylaws or these Articles of Incorporation which would materially affect such hospital subsidiary.

IN WITNESS WHEREOF, the undersigned incorporators of DMC/WSU Health System have executed these Articles of Incorporation as of December 18. 1984, to be filed effective January 1, 1985.

INCORPORATORS:

CHILDREN'S HOSPITAL OF MICHIGAN

/s/_____
David K. Page, Chairperson

and

/s/_____
Paul L. Broughton, President

DETROIT RECEIVING HOSPITAL and
UNIVERSITY HEALTH CENTER

/s/_____
John B. Waller, Jr. Dr. P.H.,
Chairperson

and

/s/_____
Edward S. Thomas, President

HARPER-GRACE HOSPITALS

/s/_____
Dean E. Richardson, Chairperson

and

/s/_____
Richard L. Sejnost, Chief Executive
Officer

HUTZEL HOSPITAL

/s/_____
Paul R. Townsend, Jr., Chairperson

and

/s/_____
Frank P. Iacobell, President

REHABILITATION INSTITUTE, INC

/s/_____
J. Kay Felt, Chairperson

and

/s/_____
Leonard F. Bender, M.D., President

WAYNE STATE UNIVERSITY

/s/_____
David Adamany, Ph.D., President

and

/s/_____
Henry L. Midler, M.D., Dean,
Medical School

APPENDIX H

SUPPLEMENT, AFFILIATION AGREEMENT

[Dated May 21, 1985]

AFFILIATION AGREEMENT

This Affiliation Agreement is made as of May 21, 1985 by and between Wayne State University, a constitutional body corporate established pursuant to Article VIII, Section 5 of the Michigan Constitution ("WSU") and DMC/WSU Health System, a Michigan nonprofit corporation

WHEREAS, it is the collective mission of the Medical Center institutions (i.e., Children's Hospital of Michigan, Detroit Receiving Hospital and University Health Center, Harper-Grace Hospitals, Hutzel Hospital, Rehabilitation Institute, Inc. and WSU) to be a cohesive, preeminent academic health center, which evidences the interdependent relationship of WSU and the other Medical Center institutions, integrates education, research and clinical service, maintains centers of excellence and strives to provide high-quality primary, secondary and tertiary care within the framework of an integrated, synergetic health care delivery system; and

WHEREAS, it is the consensus of the Medical Center institutions that if their collective mission is to be fulfilled, and if they are to respond effectively to the challenges of a changing environment and to achieve their own distinct

missions, they must be strengthened through the unification of the institutions other than WSU under the direction of a strong holding company; and

WHEREAS, DMC/WSU has been established to serve as the single overall holding company for the Medical Center institutions other than WSU, having as its subsidiaries all institutions other than WSU and providing for ancillary and supposing activities as appropriate; and

WHEREAS, to achieve the purposes of DMC:/WSU, it is necessary that it be affiliated with WSU and the parties desire to set forth their understandings regarding this anticipated long-standing affiliation; and

WHEREAS, the affiliation with WSU is intended to foster and enhance the relationships between faculty and non-faculty members of the medical staffs of the Medical Center institutions and to protect the rights of all.

NOW, THEREFORE, WSU and DMC/WSU hereby agree as follows:

I. Affiliation.

It is acknowledged that the DMC/WSU subsidiaries (i.e. the Medical Center institutions (other than WSU) and any other subsidiaries of DMC/WSU) constitute the academic health center of WSU and that DMC/WSU shall serve as the entity through which the affiliation of its subsidiaries with WSU is administered and strengthened to serve both WSU and the subsidiaries.

II. Medical Board.

A. DMC/WSU shall establish a Medical Board to address issues relating to the medical programs necessary for the DMC/WSU subsidiaries to maintain centers of excellence and to provide high quality primary, secondary and tertiary care within the framework of an integrated synergetic health care delivery system. The Medical Board shall consist of (i) the Dean of the School of Medicine of WSU, who shall be the Chairperson of the Medical Board (except as otherwise provided herein); (ii) five clinical department chairpersons selected from time to time by WSU from persons nominated by the Council of Department Chairpersons of WSU (and including the Chairpersons of Medicine, Surgery, Obstetrics/ Gynecology and Pediatrics), (iii) a representative of the medical staff leadership of each Medical Center institution selected from time to time by such institution (and for such purposes, Harper-Grace Hospitals shall be treated as two separate institutions), (iv) the President of DMC/WSU and (v) the Chairperson of the Management Council of DMC/WSU, if such person is other than the President of DMC/WSU. Initially, the physician representatives shall be Dr. Nadler as Chairperson; Drs. Vaitkevicius, Walt, Sokol, Gruskin and Weiner, as the five clinical department chairpersons; and Drs. Jenkins, Ingberg, Endler, Ryszewski, Black and Reynolds, representing the medical staff leadership of the Medical Center institutions. Other members may be added to the Medical Board from time to time by the Board of Trustees of DMC/WSU.

B. The Chairperson shall designate a physician from among the selected representatives of the medical staff leadership of the DMC/WSU subsidiaries to act as Vice-

Chairperson of the Medical Board. The Vice-Chairperson shall, chair the Medical Board in the absence of the Chairperson, shall perform such other duties as the Medical Board may from time to time determine and shall represent the medical staff leadership of the Medical Center institutions for purposes of attending meetings of the Board of Trustees of DMC/WSU pursuant to its Bylaws. Each physician representative on the Medical Board shall designate an alternate who shall be expected to attend meetings in the absence of the representative.

III. Selection and Retention of the Dean of the School of Medicine.

It is hereby acknowledged by WSU that as long as the Dean of its School of Medicine shall serve as Chairperson of the Medical Board, the Dean shall, in his or her capacity as Medical Board Chairperson, be an officer and employee of DMC/WSU responsible in that capacity to the President of DMC/WSU in the administration of the medical affairs of DMC/WSU. As such, the following procedures shall apply with respect to the selection and retention of the Dean:

A. Whenever a Dean of the School of Medicine is to be appointed, a committee shall be established to seek out properly qualified individuals. The members of the committee shall be jointly appointed by the President of WSU and the President of DMC/WSU, and they shall both serve as members ex officio. In the event the terms of any collective bargaining agreement with the faculty of WSU cannot be waived or otherwise satisfied through appointment of such a committee, the parties shall adopt alternative procedures to ensure that the advice and counsel of DMC/WSU regarding

prospective candidates is obtained in a manner consistent with the obligations of WSU under such collective bargaining agreement. In any event, prior to appointment of the Dean, WSU shall consult with DMC/WSU to ascertain whether the appointee will also be approved by the Board of Trustees of DMC/WSU as the Chairperson of the Medical Board and if so, whether the conditions of appointment as Dean and as Chairperson of the Medical Board are mutually acceptable to WSU and DMC/WSU. If the appointee or the conditions of his or her appointment are not acceptable to DMC/WSU and the matter cannot be mutually resolved to the satisfaction of both parties, DMC/WSU need not appoint the individual as Chairperson of the Medical Board and/or it shall have the remedies provided in Section IX. C.2 below.

B. In the event of a disagreement between WSU and DMC/WSU regarding the performance of the Dean, the parties shall seek to resolve the question through a joint committee consisting of the President of WSU, the President of DMC/WSU, the Chairperson of the Board of Governors of WSU, the Chairperson of the Board of Trustees of DMC/WSU and a representative of the Medical Board. DMC/WSU and WSU may each add two additional voting members to the committee in an effort to help resolve any differences if the committee, as originally constituted, cannot effect resolution of the problem. In the event the problem is not resolved to the satisfaction of DMC/WSU, DMC/WSU may remove the Dean as Chairperson of the Medical Board and/or it may have the remedies provided in Section IX.C.2 below.

C. WSU retains the right to terminate the Dean at any time in accordance with its internal procedures. Before

instituting such procedures, the President of WSU shall consult with the President of DMC/WSU. When a Dean has been terminated, a search committee shall be appointed as described in Section III.A above to identify a suitable replacement.

IV. Presidents' Advisory Council.

To assist WSU and DMC/WSU in fulfilling their responsibilities under this Affiliation Agreement with respect to graduate and undergraduate educational programs not covered by the Wayne State University/Detroit Medical Center. Graduate Medical Education Memorandum of Understanding (the "GME/MOU"), there shall be established a Presidents' Advisory Council consisting, at a minimum, of the Presidents of DMC/WSU and WSU or their designees, and the Deans of the School of Medicine, College of Nursing, College of Pharmacy and Allied Health Professions and School of Social Work of WSU. Additional deans may be added to the Presidents' Advisory Council, with the approval of the President of DMC/WSU and the President of WSU, to represent other health-related academic programs that have clinical activities in the DMC/WSU institutions. The Presidents' Advisory Council shall meet at least three times a year upon the call of the President of DMC/WSU or of the President of WSU or their designees.

V. Fulfillment of Educational and Research Needs.

Whenever WSU has an educational or research need requiring an affiliation with a hospital or other health care institution, or one of the DMC/WSU subsidiaries has an

educational or research need requiring an affiliation with an educational institution, or whenever one of the DMC/WSU subsidiaries or WSU has a need to terminate or modify an affiliation agreement already in existence between them, that need shall be discussed with (i) the President of DMC/WSU or his or her designee, (ii) the President of WSU or his or her designee, (iii) the Management Council of DMC/WSU and, (iv) in the case of programs other than medical education programs, with the Presidents' Advisory Council. In the case of medical education programs, in lieu of the Presidents' Advisory Council, the matter shall be discussed with the Medical Board and, to the extent graduate medical education programs are involved, also with the WSU/DMC Graduate Medical Education Program Dean's Council (established pursuant to the GME/MOU). The purpose of the discussion shall be to determine whether the need of WSU can be satisfied through an affiliation with a DMC/WSU subsidiary (or conversely the need of the DMC/WSU subsidiary can be satisfied through an affiliation with WSU). In the event WSU has an educational or research need which, in the judgment of WSU, cannot be satisfied by a DMC/WSU subsidiary WSU may pursue an affiliation with an institution other than a DMC/WSU subsidiary. In the event a DMC/WSU subsidiary has an educational or research need which, in the judgment of DMC/WSU, cannot be satisfied by WSU a DMC/WSU subsidiary may pursue an affiliation with an institution other than WSU. A determination to pursue such an affiliation shall not be made, however, until at least fifty days after discussions have commenced. Nothing in this Section V shall affect affiliation agreements in effect as of the date of execution of this Agreement unless and until either WSU or DMC/WSU gives notice to the other that it desires to review any such affiliation agreement and provided that the term of

such agreement has expired or such agreement is otherwise subject to review in accordance with its terms.

VI. Physician-in-Chief.

A. The Memorandum of Agreement Between Wayne State University (For And On Behalf Of Its School Of Medicine) and The Detroit Medical Center Member Institutions, dated May 28, 1980, as supplemented by one or more addenda thereto (the "Medical School Affiliation Agreement") recognizes the positions of Chairperson of a WSU Department and Chief of a Hospital Department ("Hospital" meaning, for purposes of this Agreement, a DMC/WSU subsidiary and "Department" including, as the context requires, a section in lieu of a department). DMC/WSU may, in addition, establish a third position, that of Physician-in-Chief, with respect to any medical service offered by a DMC/WSU subsidiary. The Physician-in-Chief shall be responsible for the educational and research, if any, and clinical components of that service as follows:

1. With respect to the educational and research component of the service, if any:

(a) If the Physician-in-Chief also serves as the Chairperson of a WSU Department, his or her educational and research responsibilities shall be fulfilled in his or her capacity as Chairperson. If the Physician-in-Chief does not serve as a Chairperson of a WSU Department, either because there is not a comparable department or it is the decision of the DMC/WSU and WSU that the Chairperson should not serve as Physician-in-Chief, the educational and research responsibilities of the Physician-in-Chief shall be set forth in

a delegation of responsibility mutually agreed upon by DMC/WSU and WSU.

(b) If the Chief of a Hospital Department is not the Physician-in-Chief, the Chief of the Hospital Department shall be directly responsible to the Hospital for the educational and research programs of his or her Department, but shall in addition be responsible to the Physician-in-Chief for supporting the educational and research programs for which the Physician-in-Chief is responsible.

2. With respect to the clinical component of the service:

(a) If the Physician-in-Chief also serves as the Chief of a Hospital Department, his or her service responsibilities with respect to that Hospital shall be fulfilled in his or her capacity as Chief. If the Physician-in-Chief does not serve as a Chief of a Hospital Department (e.g., in the situation where the Physician-in-Chief is not the Chief of the Department in all Hospitals), the service responsibilities of the Physician-in-Chief and the Chief of the Hospital Department shall be set forth in statement of understanding mutually agreed upon by DMC/WSU and the affected Hospital(s). The statement of understanding shall recognize that the Board of Trustees of each Hospital is responsible for the appointment, reappointment and delineation of clinical privileges of the physicians on the medical staff of that Hospital.

(b) If the Chief of a Hospital Department is not the Physician-in-Chief, the Chief of the Hospital Department shall be directly responsible to the Hospital for the service programs of his or her Department but shall in

addition be responsible to the Physician-in-Chief for (i) fulfilling the responsibilities of the Chief as set forth in the statement of understanding described in Section VI.A.2(a) above and (ii) enabling the Physician-in-Chief to fulfill his or her responsibilities as set forth in the statement of understanding.

3. The Physician-in-Chief shall periodically review and make recommendations to the President of DMC/WSU, to the President of WSU and to the President of each Hospital (and/or their designees) with regard to the educational, research and clinical programs of the Hospital as they relate to the overall service programs for which the Physician-in-Chief is responsible.

4. The Physician-in-Chief, if not the Chief of a Hospital Department, shall be responsible for discussing with the Chief their respective educational and research responsibilities as provided in Section VI.A.1 above and their respective clinical responsibilities set forth in the statement of understanding described in Section VI.A.2(a) above. It is contemplated that such discussions will encompass an evaluation of the impact of any changes in such service programs prior to the implementation of such changes. Disputes between, a Physician-in-Chief and the Chief of a Hospital Department which cannot be resolved through such discussions or through discussions with the Dean of the Medical School of WSU and the President of the Hospital may then be referred to the Management Council of DMC/WSU and/or the Medical Board for further recommendation and failing resolution of the maker may be resolved in accordance with the procedures described in Section VII below.

5. Whether or not a Physician-in-Chief serves as a Chairperson of a WSU Department or Chief of a Hospital Department, the Physician-in-Chief shall be responsible to DMC/WSU for fulfilling his or her educational, research and service responsibilities. If the Physician-in-Chief serves as a Chairperson of a WSU Department, he or she shall also be responsible to WSU for fulfilling his or her educational and research responsibilities.

B. Whenever WSU has occasion to seek a new Department Chairperson in the School of Medicine, the Dean of the School of Medicine of WSU shall not only consult with the President(s) of any involved Hospitals in accordance with the Medical School Affiliation Agreement to ascertain whether a simultaneous Chairperson/Chief appointment at that time is advisable, but shall also consult with the President of DMC/WSU to determine whether the individual who shall be a Department Chairperson shall also serve as Physician-in-Chief. If the President of DMC/WSU, after consultation with the Medical Board, determines that the person sought as a Department Chairperson should also serve as a Physician-in-Chief, the following procedures will apply:

1. A committee shall be appointed to seek out properly qualified individuals. The members of the committee shall be jointly appointed by the Dean of the School of Medicine of WSU and the President(s) of the involved Hospital(s), provided that the President of DMC/WSU and the President of WSU concurs in the appointments. In the event the terms of any collective bargaining agreement with the faculty of WSU cannot be waived or otherwise satisfied through appointment of such a committee, the Dean, the President(s) of the involved

Hospital(s), the President of DMC/WSU and the President of WSU shall adopt alternative procedures to ensure that the advice and counsel of all parties regarding prospective candidates is obtained in a manner consistent with the obligations of WSU under such collective bargaining agreement.

2. Prior to appointment of a Department Chairperson, WSU shall consult with DMC/WSU to determine whether the appointee will also be approved by the Board of Trustees of DMC/WSU as Physician-in-Chief. If the appointee is not acceptable to DMC/WSU and the matter cannot be mutually resolved to the satisfaction of both parties, WSU may appoint the individual as Department Chairperson, but DMC/WSU need not appoint the individual as Physician-in-Chief and/or it shall have the remedies provided in Section IX.C.2 below.

3. Except as otherwise provided by DMC/WSU, no person shall be appointed as Physician-in-Chief unless he or she serves as the Chief of a Department of at least one Hospital.

C. The President of DMC/WSU (or his or her designee) may participate in any self-evaluation or joint review of programs contemplated under the Medical School Affiliation Agreement. All reports of such reviews shall be submitted to the President of DMC/WSU, the President of WSU or his or her designee, the Presidents of the affected Hospitals and the Medical Board.

VII. Disputes.

A. Except as otherwise expressly provided herein, in the event of a disagreement on any matter covered by this Agreement, the President of DMC/WSU shall attempt to resolve the dispute. In the event the President of DMC/WSU cannot resolve the dispute or in the event the dispute involves the President of DMC/WSU, a committee shall be appointed upon the request of the President of WSU, the President of DMC/WSU or the President of any Hospital. The committee shall consist of the Presidents of the affected Hospital(s), the Chairperson of its (their) Board(s) of Trustees, the President of DMC/WSU, the Chairperson of its Board of Trustees, the President of WSU, two additional designees of the President of WSU, the Dean of the School of Medicine of WSU, the Chairperson of the Board of Governors of WSU and a representative of the Medical Board. In the event the dispute still cannot be resolved, the matter shall be referred to the Board of Trustees of DMC/WSU to recommend a resolution. Any resolution of a dispute shall require the concurrence of DMC/WSU and WSU.

B. In the resolution of any dispute involving DMC/WSU, its subsidiaries or WSU, the following principles shall apply:

1. WSU at all times retains the right to terminate a Chairperson of a WSU Department.

2. Each Hospital at all times retains the right to terminate a Chief of the Hospital's Department, for failure to comply with all applicable

bylaws, rules, regulations, policies and procedures of the Hospital or otherwise.

3. DMC/WSU at all times retains the right to terminate a Physician-in-Chief.

4. A person who is terminated as the Physician-in-Chief shall be terminated as a Chief of a Hospital Department, in the event he or she serves in that other position, unless DMC/WSU and the other appropriate party or parties, after consultation, agree otherwise. WSU may retain such individual as Chairperson of a WSU Department, but in such event the educational and research responsibilities of the successor Physician-in-Chief shall be set forth in a delegation of responsibility mutually agreed upon by DMC/WSU and WSU, as is provided in Section VI.A. l(a) above.

5. In those circumstances where the Physician-in-Chief and Chief of a Hospital Department are not the same person, if the Physician-in-Chief cannot fulfill his or her responsibilities as set forth in the statement of understanding described in Section VI.A.2(a) above as a result of the actions or conduct of the Chief of a Hospital Department, then following the review and recommendation process described in Section VI.A.3 above and consideration of the matter by the Medical Board, if the problem is not resolved in a satisfactory manner, DMC/WSU shall have the right to require the Hospital to terminate the Chief of the Hospital Department and to appoint another Chief.

VIII. Medical School Affiliation Agreement and GME/MOU.

A. Sections VII, VIII and IX of the Medical School Affiliation Agreement are superseded by the provisions of this Agreement and are therefore deleted.

B. Neither the Medical School Affiliation Agreement (including any addenda) nor the GME/MOU shall be amended or otherwise modified and no addenda thereto shall be executed by any of the parties without the approval of the Board of Trustees of DMC/WSU.

C. Neither the Medical School Affiliation Agreement nor the GME/MOU shall be terminated by (1) any of the Hospitals, without the approval of DMC/WSU and the requisite notice required in the respective Agreement or (ii) by WSU, without the requisite notice provided in the respective Agreement. If the parties to such Agreement cannot resolve the dispute by the use of the dispute mechanism provided in the Agreement, they shall seek to resolve the dispute by the process described in Section VII.A. above.

D. In the event any of the provisions of the Medical School Affiliation Agreement or the GME/MOU are inconsistent in any manner with the provisions of this Agreement, the Provisions of this Agreement shall control.

IX. Miscellaneous.

A. As noted in the Medical School Affiliation Agreement, it is acknowledged that many members of the medical staffs of the Medical Center institutions are not

members of the faculty of WSU and it is not the intent of the parties to change this relationship. In contrast, this Agreement as well as the Medical School Affiliation Agreement shall be implemented in a manner designed to foster and enhance the relationships between faculty and non-faculty members of the medical staffs and to protect the rights of all.

B. This Agreement shall be interpreted in a manner consistent with the charter and bylaws of DMC/WSU and WSU and applicable law.

C. This Agreement may be modified or amended whenever necessary by the mutual written agreement of DMC/WSU and WSU. Further, this Agreement shall remain in effect until terminated:

1. By agreement of DMC/WSU and WSU; or

2. By either DMC/WSU or WSU, as of July 1 of any year, provided that not less than twenty-four months prior written notice is given by such party to the other.

D. This Agreement shall be binding upon and inure to the benefit of each of the parties hereto and its respective successors and assigns.

WAYNE STATE UNIVERSITY

/s/_____

David Adamany, President

DMC/WSU HEALTH SYSTEM

/s/_____
Clifford F. Gardner, President

The Medical Center institutions other than WSU execute this Agreement for the purpose of modifying the Medical School Affiliation Agreement and the GME/MOU in the manner described above and for the purpose of signifying their agreement to the terms and conditions of this Agreement applicable to them.

CHILDREN'S HOSPITAL OF MICHIGAN

/s/_____
Paul L. Broughton, President

HUTZEL HOSPITAL.

/s/_____
Frank P. Iacobell, President

DETROIT RECEIVING HOSPITAL AND
UNIVERSITY HEALTH CENTER

/s/_____
Edward S. Thomas, President

REHABILITATION INSTITUTE

/s/_____
Leonard F. Bender, M.D., President

HARPER-GRACE HOSPITALS

/s/_____
Richard L. Sejnost,
Chief Executive Officer

DETROIT MEDICAL CENTER CORPORATION

/s/_____
Clifford F. Gardner, President

DETROIT MEDICAL CENTER
COOPERATIVE SERVICES

/s/_____
Clifford F. Gardner, President

APPENDIX I

EXHIBITS

Harper Hospital Neurosurgery
Departmental meeting of March 7, 1997

Wayne State University School of Medicine
Neurosurgery Departmental Meeting of March 7, 1997

Harper-Grace Hospitals
Harper Hospital Division

902

MINUTES

DEPARTMENT OF NEUROSURGERY
HARPER HOSPITAL
DEPARTMENTAL MEETING OF March 7, 1990

Members Present: Dr. Diaz, Dr. Ho, Dr. Canady, Dr.Ham, Dr. Thomas, Dr. Darmody, Dr. Austin and Dr. Mazhari.

I. The minutes from March 1990, were approved as circulated.

II. The March 1990 Quality Assessment Data was reviewed.

A. The qualifications and requirements of the Clinical Nurse Specialists were reviewed and agreed upon. (see enclosure)

B. Departmental policies were agreed upon as follows:
1. Confidentiality and support within, breakage of this rule is grounds for dismissal.
2. Adopt the Reynolds Associates, P.C. Substance Abuse Policy (see enclosure).
3. A consensus was met that all departmental members would not participate in any litigation of testimony against any physician.

III. Morbidity and mortality was carried out and approved. Case presentations were made, discussed and possible solutions agreed upon.

IV. Adjournment
There being no further business the meeting was adjourned.

Respectfully submitted,

Fernando G. Diaz, M.D., Ph.D.
Professor and Chairman
Department of Neurosurgery
Wayne State University School of Medicine

PLAINTIFF'S EXHIBIT #36 4/13/95

Wayne State University
School of Medicine

Department of Neurosurgery
University Health Center
4201 St. Antoine, 6E
Detroit, Michigan 48201

MINUTES

DEPARTMENT OF NEUROSURGERY

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Respectfully submitted,

Fernando G. Diaz, M.D., Ph.D.
Professor and Chairman
Department of Neurosurgery
Wayne State University School of Medicine

APPENDIX J

CORRESPONDENCE

FROM DR. DIAZ TO
DR. AUSTIN, MARCH 15, 1990

FROM DR. DIAZ TO
DR. LESTER, JUNE 12, 1991

ANNETTE VITALE-SALAJANU TO
DR. DIAZ, JULY 16, 1991

H-1 CHECK LIST

EXHIBIT ____

Wayne State University
School of Medicine

Department of Neurosu.
University Health Center
4201 St. Antoine, 6E
Detroit, Michigan 48201

93a

March 15, 1990

Donald C. Austin, M.D.
4160 John R
Suite #507
Detroit, MI 48201

Dear Don:

It was truly a pleasure having had the opportunity to sit down with you and discuss the various points of mutual concern and interest. I believe that we had a very good conversation and I am really pleased that you are willing to help us to continue to develop a greater presence for the Department of Neurosurgery and a more organized and effective neurosurgical group. I believe that by working cooperatively and supportively, we will be able to achieve great things and make our department become once again a prominent place in the neurosurgical world.

As we discussed, you will be expected to take an active role in the academic activities of the Department, as more fully set forth below and you agreed to be bound to and comply with all of the policies of the Department. In consideration for your active participation, the increased liability attended to your commitment and your agreement to comply with all Departmental policies, we will pay a stipend equivalent to up to 50% of your current malpractice insurance cost.

Initially, the areas in which you will be involved include, but are not limited to, providing our residents rotating through your service graded progressive experience in the clinical management, clinical responsibility, surgical management and surgical experience. As you know, the Harper Hospital service is now a combined junior and senior service, which will provide you with experienced residents to assist you during surgery. We would expect that these residents would be given the opportunity to participate in patient care according to their experience and their ability. In addition, we would expect you to spend at least one afternoon a week doing teaching rounds on the floors with the residents, so that they can understand your thinking and decision process and profit from your extensive experience. We also count on your continuing participation at our routinely scheduled lecture series and invited Professor lectures. and your continuing support with the procedures required for Quality Assurance. A default on any of these activities will result in a discontinuation of the subsidy that you are receiving.

CONFIDENTIAL

In addition, one of the important policies that I consider fundamental for all faculty to participate and to warrant their continued involvement with the Department of Neurosurgery at Wayne State University, is the abstinence of participation in expert testimony, in medical malpractice litigation, on behalf of plaintiffs. I do not believe that our Department can be an antagonist to physicians in the court room.

I certainly was delighted that you are interested in contributing to our rotational call schedule system. We would be glad to instruct the residents to call upon you to refer consultations from the in-patient floor and from the emergency room at Harper Hospital and Detroit Receiving Hospital on the nights that your are on the call schedule. It is my understanding that we will start this rotational system on July 1, 1990.

I believe sincerely that with your cooperation and assistance we will be able to make our Department of Neurosurgery a stronger, more productive and successful department in the future.

With best personal regards,

Sincerely,

Fernando G. Diaz, M.D., Ph.D.
Professor and Chairman
Department of Neurosurgery
Wayne State University School of Medicine

FGD:ea

Please indicate your agreement with the
contents of this letter with your signature.

Donald C. Austin, M.D.

CONFIDENTIAL

Wayne State University
School of Medicine

Fernando G. Diaz, M.D., Ph.D.
Professor and Chairman

Neurological Surgery Department
University Health Center
4201 St. Antoine, 6E
Detroit, Michigan 48201
(313) 745-4661 (FAX) 745-4099

EXHIBIT 6

95a

June 12, 1991

Dr. Melvin Lester
Vice-President, Medical Affairs
Harper Hospital
3990 John R
Detroit, MI 48201

Dear Dr. Lester:

This is to confirm that, effective September 1, 1991, Harper Hospital will begin reimbursing Wayne State University for 100% of the annual salary and fringe benefits for Dr. Lucia Zamorano Associate Professor, 100% time, in the Department of Neurological Surgery. Her annual salary is $70,000.00 plus fringe benefits.

Sincerely,

Fernando G. Diaz, M.D., Ph.D.
Professor and Chairman
Department of Neurological Surgery
Wayne State University
School of Medicine

JM

APPROVED:

Melvin Lester, M.D.
Vice-President, Medical Affairs

DMC

EXHIBIT 8

Wayne State University
Visa Contract Review

Jamie See me ASAP

To: Dr. Fernando G. Diaz, Chair
Neurosurgery
6E UHC DMC

From: Annette Vitale-Salajanu/KHS
Annette Vitale-Salajanu, Director
International Services Office
3 West H.N.J.-Student Services Center
Ext. 7-3422

Subject: Visa Contract Review for Lucia ZAMORANO

Date: July 16, 1991

It is our understanding that you are preparing to employ Lucia Zamorano as **Associate Professor (Clinical)**. The proposed term of employment begins on **September 1, 1991** and ends on **June 30, 1993.**

We recommend that the H-1B Visa Status (Alien of International Renown) is appropriate for this individual. We will require documentation that the position requires a person of international renown. H-1B status allows initial admission to the United States for up to three years, renewable for an additional two years. Once the new immigration law takes effect on October 1, 1991, the H-1B status will be available for up to a total of 6 years. The alien will be required to leave the United States for one year prior to obtaining another non-immigrant visa at the conclusion of an authorized five/six year stay in the United States in the H-1B category.

If circumstances change, however, the H-1B status permits an alien to apply for adjustment of status to permanent resident, or change of status to another non-immigrant classification, if completed within the duration of the H-1B visa authorization period.

Our files indicate that this individual is currently in the United States on an H-1B visa which was obtained during previous employment. Once you have been authorized to extend a Letter of Offer, the process of applying for the H-1B change of employer can begin. Attached are drafts of Forms I-539 and I-129H. The prospective employer needs to complete the I-129H draft; the prospective employee needs to complete the I-539.

The processing of an H-1B Change of Employer will be handled in-house by the International Services Office. Enclosed are two IRB's which need to be encumbered and returned to this office once the **10-1489 Position Action Request** has been approved.

Enclosed is a sheet listing documents likely to be needed in this case. You are responsible for assembly of these materials.

After the submission of the I-539 , I-129H and all supporting documents, we will notify you when they have been approved. The minimum time required for processing is thirty days. If the Immigration and Naturalization Service has a backlog of cases, it can take 90 to 120 days.

If your office should receive the Form I-797 (Notice of Non-Immigrant Visa Petition or Extension of Stay of Non-Immigrant H or L Alien) directly, please contact our office immediately.

The letter of offer may now be prepared consistent with the information in this memo.

AVS/kah
enclosures

H-1 CHECK LIST

Instructions: All materials checked below should be forwarded as a complete package to the International Services Office as soon as the approval occurs. Send to: 3 West Helen Newberry Joy S.S.C.

✓ Medical license / board certificate np

___ Ph.D. Diploma (original and 3 copies)

✓ np Ph. D. Diploma (3 copies certified by U.S. consul abroad)

___ Ph.D. Transcript (original and 3 copies)

___ Ph.D. Transcript (3 copies certified by U.S. consul abroad)

___ Ph.D. copy of dissertation abstract

___ Ph.D. certification from University Registrar that all degree requirements have been met

___ MS/MA Diploma (original and 3 copies)

___ MS/MA Diploma (3 copies certified by U.S. consul abroad)

___ MS/MA Transcript (original and 3 copies)

___ MS/MA Transcript (3 copies certified by U.S. consul abroad)

___ MS/MA Certification from University Registrar that all degree requirements have been met

✓ I-94 copy; original to be submitted to ISO at time I-506 or I-539 signed by alien

___ I-20 original

___ I-20 copy

___ I-20 ID yellow card

___ IAP-66 all original pink copies

✓ I-171C (Notice of Approval of H-1) All prior copies . May be blue form I-797

✓ I-129H draft signed by Department Chair

___ Letter from current H-1 employer attesting to position held and dates of employment

___ I-506 draft signed by alien

___ I-539 draft signed by alien

XX Official WSU letter of offer (must include standard language about maintaining non-immigrant status and completing I-9 timely); H-1 petition cannot be filed without copy of letter of offer signed by all pertinent University officials

✓ Photocopy of passport (all pages)

___ Statement of Responsibility of Legal Costs or ✓ IRB for in-house case

___ Checks made payable to the Immigration and Naturalization Service for:

___ $70

___ $80

✓ Resume or curriculum vitae, including publications list (3 copies)

___ Letter regarding patient contact by a foreign physician

✓ Visa history

___ Justification of Hire submitted to Personnel or detailed description of duties

✓ Letters of Recommendation (copy of all 3) from various countries

✓ Abstracts of publications confirming experience abroad;

✓ Evidence of membership in professional associations attesting to expertise

*NOTE Any documents in a foreign language must be accompanied by a translation certified by a translator as to accuracy, based on the translator's language competency.

APPENDIX K

DEPOSITION EXCERPTS

DEPOSITION OF BROUGHTON
February 18, 1996

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A. Yes, they are.

Q. And what is your understanding of the relationship among the hospitals within the DMC, based on this document, Exhibit 3? You said yourself –

MR. GALVIN: Other than what is stated in the document?

A. Could you be a little more – I mean –

BY MR. KAPLANSKY:

Q. Do you consider yourselves to be partners within the DMC?

A. Well, the other hospitals are wholly owned subsidiary of the DMC. So, yes, we are. Yeah, we're more than partners legally, and we're partners in the general parlance of the word.

Q. Was that true as of when this document was signed, Exhibit 3?

A. No, I don't - I don't - I can't describe the - excuse me, the legal relationship prior to '85.

I mean we were connected, but I can't tell you exactly what the reserve powers, et cetera, et cetera, were.

Q. Is Harper owned by DMC now?

A. Yes, yes.

Q. And when did that occur?

* * *

Pages 52-53

. . . connectable, there's a connection of being taller than Detroit -- than Detroit Receiving Hospital facility. There are no connections at the level at those levels.

Q. And Harper Hospital leases space within that building?

A. Yes, sir.

Q. Do you know of the occupiable space available, what percentage Harper occupies?

A. I really do not know that.

Q. Dr. Diaz, he is paid by Harper Hospital pursuant to a contract?

A. Yes, sir.

Q. That is an annual contract?

A. I can't -- it may be a two year contract, I don't know.

Q. It's a renewable contract?

A. It is a renewable contract.

Q. And he's also paid -- to your knowledge, is he paid by the university?

A. Yes, he is.

Q. Is that a salaried position?

A. Yes, it is.

Q. And in addition, he receives money under the faculty practice plan?

A. I have -- I assume so, but I have no knowledge of that.

Q. If, for example, a patient treated by Dr. Diaz, there would be a physician component and a hospital component to the bill, would that be accurate? The bill to the patient, for services?

A. If we're talking about an inpatient, that is operated on by Dr. Diaz, yes. The hospital would bill the patient for the hospital's services, and Dr. Diaz would bill the patient for professional services.

Q. How many beds does Harper have?

A. Let's say operating beds? We have staff beds right now, approximately six hundred.

Q. Hospitals, your hospital, Harper Hospital, are interested in profit and loss margins, and things of that nature?

A. Yes.

Q. I don't recall if I asked you this: did you participate in the lease negotiations between Harper and University Health Center?

A. No, I did not.

Q. Who did that?

A. Well, I have to look at the document that you gave me and see who signed.

* * *

Pages 70-71

. . .received for the services is regarded as the net?

A. Right.

Q. And are there some physicians there who show up in a loss column?

A. There are some physicians who show up on a loss column, right.

Q. Okay. To your knowledge, does Dr. Zamorano have an engineering degree?

A. I can't specifically recall her educational accomplishment.

Q. Have you ever learned that she has an engineering degree?

A. I can't honestly answer that, sir. I don't recall.

Q. To your knowledge, does Dr. Zamorano generate more dollars for the hospital than any of the neurosurgeons?

A. Yes, she does, to my knowledge.

Q. Do you know Vicki Diaz?

A. Yes, I do.

Q. By whom is she employed?

A. Harper Hospital.

Q. And what is her capacity?

A. She works under contract to the University Neurosurgeon.

Q. But she's a Harper employee?

A. Right.

Q. And does she have a contract with Harper?

A. No, she is employed by Harper. We have a contract with the Neurosurgery Faculty Practice Plan.

Q. Harper has the contract with the University Faculty Practice Plan, pursuant to which she works for?

A. Harper.

Q. She's paid by Harper?

A. Yes.

Q. Does the work -- she does the work --

A. Yeah.

Q. The work that she does, is that for Harper or for the university, or for both?

A. It is for the Department of Neurosurgery, so I would have to assume that it could be both.

Q. Is that Department of Neurosurgery divided hospital, university component, or it's just one department?

A. Well, it's a department of Harper Hospital, it is also a department of the School of Medicine.

Q. Okay. But are they combined in such a way they kind of do everything together?

* * *

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A. Dr. Austin did communicate with me on that regard.

Q. And what was the substance of the communication?

A. I don't have Dr. Austin's memo that he -- he set in front of me, but I believe he stated that was his feeling, that he was removed because of his concern over Dr. Zamorano's qualifications.

Q. And do you recall correspondence from Dr. Austin, where he indicated that Dr. Zamorano's privileges had been limited when she was at Henry Ford Hospital, she was not Board certified, couldn't be Board certified, and therefore he made issue of this with the Credentials Committee?

A. I'm aware of Dr. Austin's memo in that regard.

Q. Did you form an opinion as to whether Dr. Austin was essentially thrown off the Credentials Committee because he had voiced objections to Dr. Zamorano?

A. I never formed that opinion.

Q. How did you handle the complaints from Dr. Austin with respect him being thrown off the committee?

A. I never classified that as being thrown off the committee. Just Dr. Diaz wanted to have some changes in the department, and he appointed someone else to the Credentials Committee rather

* * *

DEPOSITION OF FERNANDO DIAZ, M.D.
FEBRUARY 8, 1996

Pages 19-20

Q. Is that contract still in effect?

A. Yes.

Q. And the employment with the university, that's still in effect now?

A. Yes.

Q. With what other entities are you associated?

A. With the private practice group that we have, University Neurosurgery Associates.

Q. And what is that?

A. It's a P.C.

Q. How does that fit into the university and the hospital?

A. The practice of neurosurgery -- the university does not practice medicine; the university is only related to education. And the medicine is practiced by individual groups. University Neurosurgery happens to be one of those groups.

Q. As part of your agreement with the university, were you compelled to become a part of the Neurosurgery

Associates?

A. No. This is something that was in existence when I arrived, and I became the president of the group at that point.

Q. As part of your agreement with Harper, and/or the university, were you compelled to become associated with Neurosurgery Associates?

A. No. I could have started another corporation, if I wanted to.

Q. What is the faculty practice plan?

A. That is a structure within the university that is composed of all the Chairs of the faculty groups, all of whom contribute tithings to the university, for being associated with the university.

Q. Contribute what?

A. Tithings.

Q. Which means what?

A. An annual return to the dean, like a tax.

Q. Do you receive a salary from Neurosurgery Associates?

A. Yes.

Q. Monthly? Weekly?

A. Monthly.

Q. Is that salary dependent on the performance of the P.C.?

A. Well, it's dependent on the activities, surgical activities that we all perform.

Q. Do you maintain a practice anywhere else?

A. No.

Q. Are you associated with any other entities?

A. No.

* * *

Pages 31-42

Q. What is there about being a department chairman that attracted you?

MS. HOWE: Objection; asked and answered. Go ahead.

A. I can't give you any better answer. I'm sorry.

BY MR. KAPLANSKY:

Q. Did you know why it was something you always wanted to do?

A. Same reason why I wanted to learn scuba diving, I guess.

Q. Does becoming a department chairman have with it certain degree of status?

A. Yes, it does.

Q. Was that status something that you desired and was important to you?

A. No.

Q. Did the Ph.D. that you acquired have with it a certain degree of status?

A. Every degree has a certain degree of status.

Q. Is the status of significance to you?

A. No.

Q. Does the department chairmanship enhance what you believe your reputation to be?

A. No.

Q. Does the Ph.D. enhance what you believe your reputation to be?

A. No.

Q. Do you have an understanding of, when I say "reputation," do you know what that means?

A. To me, reputation is the opinion that people have of you in the community.

Q. In your opinion, would your reputation be enhances if persons knew that you were also chairman?

A. It might be.

Q. When you meet somebody else, is your opinion of that other person enhanced by the fact that that person is a chairman?

A. No.

Q. Are there any other clinics, besides Preferred Medical, Inc., with which you may be associated?

A. We have an office at the Novi clinic for the Detroit Medical Center, in Novi.

Q. Is your compensation from that clinic, separate from any other compensation?

A. Yes.

Q. How are you paid there?

A. Just by the patients we see in consultation.

Q. And on what days do you appear in Novi?

A. One of us has a clinic there every day.

Q. Who are "us"?

A. The members of the University Neurosurgery Associates.

Q. Are there any other satellites?

A. We're contemplating opening one in Southfield.

Q. Do the monies from the satellites go to the university?

A. No.
Excuse me. A tax goes to the university.

Q. And what is that tax?

A. Six percent of what we make.
Let me restate that, please.
Nine percent of what we make goes in tax to the university. Three percent goes to the dean, and six percent goes to the Fund for Medical Research and Education.

Q. When you say "the dean"? Do you mean the dean, personally?

A. Well, I really couldn't tell you where it goes. I just write the check.

Q. And the check is written to the dean?

A. To the dean. Under the university rubric.

Q. Do you think it enhances the status of Wayne State University Medical School to be associated with Harper Hospital?

A. I don't know that it enhances it. It is part of the same thing.

Q. Do you know for what period of time the university and the hospital have been associated with one another?

MS. HOWE: Objection; foundation

A. No, I don't.

BY MR. KAPLANSKY:

Q: To your knowledge, they were associated with each other before you came to this area?

A. I've been in Detroit since 1978, and it is my understanding they have been associated since then or before. But I don't know when.

Q. In your opinion, is it a good relationship? Beneficial?

A. Yes.

Q. Doctor, I've just been handed your CV. We kind of discussed it's becoming large. Can I assume that you're very proud of this CV?

A. Well, I'm more proud of the accomplishments of my group, rather than what I do.

Q. Would it be true that you're proud of both of those things?

A. Yes, I am.

Q. And would you agree with me that those accomplishments go into part of making up your reputation?

A. Yes.

Q. And those accomplishments are actually listed – well, at least the personal ones that you've done, are listed in this CV; is that accurate?

A. Yes.

Q. When you completed your Ph.D., you were given a certificate?

A. Yes.

Q. What does it look like?

A. It's like a law degree. It's a big paper, with ribbons and colors, and the name and university logo.

Q. Like a diploma?

A. Yes.

Q. Have you ever seen Dr. Zamorano's Ph.D.?

A. I have seen a Doctor in Medicine diploma, which I think is what she considers to be a Ph.D. That's only something I have seen recently.

Q. Let's go back to my question. Have you ever seen a certificate, a document, wherein – an official documents like the one you got, wherein Dr. Zamorano was granted Ph.D.?

A. I don't recall seeing that.

Q. Have you ever seen an official transcript of her academic record?

A. From different places, yes.

Q. From Chili, from Germany, from Henry Ford.

Q. And so, are you testifying that you have seen – let me back up.

Have you ever seen a certified copy of academic transcript, wherein she was granted a Ph.D. degree?

A. No, I have not.

Q. You understand there's been some dispute about whether, the exact status of her Ph.D. degree?

A. I believe Dr. Austin has questioned that, yes.

Q. Have you undertaken to perform any further investigation as to the credibility of that particular document?

A. Only recently, we have made some inquiries about that, yes.

Q. And where are those inquiries made?

A. They're in progress at the moment.

Q. And have those inquiries been in response to some of the information that was provided in this lawsuit?

A. As a result of it, yes.

Q. When is the last time you performed surgery at Providence?

A. I never have.

Q. Do you perform any surgeries at St. John's?

A. No.

Q. Do you attend meetings there?

A. Occasionally.

Q. Once a year or something?

A. Something like that.

Q. And Providence, same thing? Once a year, if that?

A. Yes.

Q. While you were clinical associate professor for the University of Michigan, were you paid by the University of Michigan?

A. No.

Q. That was a volunteer activity?

A. Yes.

Q. I teaching important to you?

A. Yes.

Q. Are you active in medical politics?

A. Not really.

Q. With what other groups do you serve in an administrative capacity? We talked about the AANS, where you're on an executive committee.

A. If I could look at this?

Q. Sure

MS. HOWE: For the record, "this," that you're referring to, is your CV?

THE WITNESS: CV?

A. I'm the Chairman of the Education Committee for the Latin American Federation of Neurological Surgery.

I have - and I just noticed this is not included here. I have recently been appointed to the chairmanship of the Education Committee for the International Section for the American Association of Neurological Surgeons. And I am the Executive Committee for the Ad Hoc Education Group for the World Federation for Neurosurgical Societies.

Q. Are there any others?

A. I think those are the most current and active ones.

Q. Are you involved in any board certification activities?

A. I have been an examiner for the Board, yes.

Q. When?

A. The last time was, I believe, in 1993.

Q. And how many previous occasions?

A. Just the one time.

Q. In your relationship with the university as a full professor, we talked about your employment as full professor, in your opinion does that enhance your reputation?

A. Like everything else I do.

Q. I don't understand that. Forgive me. In your opinion, does that enhance your reputation?

A. Any activity that I perform in a capacity such as that one, I think has an effect on my reputation.

Q. The position of chairman is important? I'm sorry. The position of chairman is important to you? I'm sorry, we've talked about chairman. The position of professor is important to you?

A. Well, they're one and the same. They're not, they can't be divorced.

Q. At another institution, one could be a professor, without being a chairman; is that true?

A. Yes.

Q. And one could be a chairman, without being a professor?

A. Correct.
No you cannot.

Q. Oh, okay.

A. If it is an academic institution, it is one and the same.

Q. So the chairmanship is actually an enhancement of the professorship?

A. The chairman is the person at the top of the group.

Q. Okay. Do you believe that - well, your position as professor/chairman, you would agree, enhances you professionally?

A. No. Work of- mouth is what enhances me professionally, more than anything.

Q. In your opinion, is your position as professor/ chairman, does that enhance yourself, to yourself, personally?

A. It's an accomplishment that I have made. So my personnel appreciation of it is enhances, yes.

Q. And would you also agree that your position as professor/chairman enhances you financially?

A. No.

Q. What is the total amount of grants you're working on right now?

A. There are several, and I can't give you the exact number.

Q. Okay. Could you give me a ballpark?

A. Not really. We have seven or eight grants in total, but I can't tell you what they are.

Q. Would those grants total a hundred thousand dollars?

A. Oh, in money, you mean?

Q. Yes.

A. Oh. Somewhere in that neighborhood, yes.

Q. Would they total half a million dollars?

A. No, I think it's somewhere between two and three hundred thousand.

Q. Since your association with Harper and the university, has your pay increased?

A. No.

Q. Has it stayed the same?

A. Yes.

Q. Has your pay from Neurological Surgery Associates, forgive me if I didn't say that right, has that stayed the same, or has that increased?

A. I think it increased in the first year, but it has remained the same ever since.

Q. Would you agree that your job as chairman/chief is to make the relationship of the university and hospital, to make it good, beneficial, run properly?

A. That's one of my responsibilities, yes.

Q. Are there any neurosurgeons who are actively on staff at Harper Hospital, who are not faculty members?

A. Yes.

Q. Who are they?

A. Dr. Ho, Dr. Mazhari, and Dr. Audet, and Dr. Jerry Moore and – how many did I give you?

MS. HOWE: Would you like them read back to you?

THE WITNESS: Yes.

(The record was read.)

A. Not Ho. Mazhari, Audet, Moore, and Austin.

MR. KAPLANSY: Read my question back please.

(The record was read.)

BY MR. KAPLANSKY:

Q. Is Dr. Austin a faculty member?

A. He is in the courtesy faculty, yes.

Q. And Dr. Austin practices at Harper?

A. Yes.

Q. Are you aware of any other hospital he practices at?

A. I believe his primary practice is there. He has, I understand, privileges at Receiving Hospital and at . . .

DEPOSITION OF FERNANDO DIAZ, M.D.
JUNE 13, 1996

Pages 15-30

Q. Do we have that?

A. I believe Mr. Bernard has a copy of it.

Q. May I see that? May I see it?

MR. BERNARD: I don't have it.

MR. KAPLANSKY: You don't have it?

MR. BERNARD: No, I don't have it.

Q. (BY MR. KAPLANSKY): Why did you send it to Dr. Brock for a translation?

A. Because the degree had been awarded by his department.

Q. Well, the degree is in the German language, is it not?

A. Correct.

Q. And the degree is capable of being translated by a translator, is it not?

A. Correct, but Dr. Brock is fluent in English and he translates it well.

Q. What did he translate it as?

A. I'm sorry?

Q. What did he translate it as?

A. I cannot read you verbatim what he said. But the substance of the translation indicated that she had received a Doctor in Medicine Degree.

Q. Medical Doctor Degree?

A. Well, it's a different thing than a Medical Doctor, it's my understanding. But it's a degree over and above the Medical Doctor.

Q. To your knowledge, is Dr. Brock going to come and testify in this case?

A. No, I have no idea.

Q. Do you recall seeing this letter here that was addressed to Dr. Austin from Dr. Brock?

A. I really can't tell for sure whether I've seen this document or not. I'm not familiar with it.

Q. Do you recall it coming up in one of the earlier depositions?

A. Pardon?

Q. Do you recall this document being produced several months ago?

A. No, I don't.

Q. Have you had an opportunity to talk to Dr. Brock recently?

A. Probably within the last month or so.

Q. How did that come about?

A. We meet periodically and we are members of an International Order of Neurosurgery and we have periodic conversations.

Q. And when was it –

A. Let me answer this. (Whereupon, a discussion was held off the record.)

Q. (BY MR. KAPLANSKY) : Do you recall seeing this document here, an April 4, 1994 letter to Dr. Brock from Dr. Austin?

A. I'm not sure if I have seen this before or not. I've never seen a document bearing the Department of Commerce label by Dr. Austin.

Q. Did Dr. Brock indicate to you that the degree that Dr. Zamorano received was something other than a Ph.D.?

A. Well, he told me the correct name is, I cannot give you the German terminology, but the correct name would be Doctor of Medicine.

Q. Is that, to your understanding, is that something other than a Ph.D.?

A. Well, it is my understanding there is a degree conferred by European schools which is over and above what the Medical Doctor degree requires. It is based on a study course of several subjects and presentation of what they call a thesis.

Q. Is it something other than a Ph.D.?

A. Yes, that's correct.

Q. Has Dr. Zamorano been requested by yourself to remove Ph.D. from her identification?

A. After I discussed the discrepancy with Dr. Brock, we decided it was proper to use the German terminology and we are using that instead.

Q. What is that?

A. Doctor of Medicine.

Q. So, does that mean that any future documents that bear Dr. Zamorano's name will no longer have Ph.D. after it?

A. Correct.

MR. BERNARD: Are you talking about documents produced by who?

MR. KAPLANSKY: The department.

MR. BERNARD: Okay.

Q. (BY MR. KAPLANSKY): Were you aware in 1991 that Dr. Zamorano did not possess a Ph.D.?

A. No, it was my understanding that she had a Ph.D.

Q. Did you ever hear back in 1991 -- '91 is the year that you brought her from Ford over to Harper?

A. Correct.

Q. In 1991, did you hear any rumors or, for lack of a better word, rumors, that her credentials were not what they appeared to be?

A. No, because we had a letter from Dr. Brock or the translation of a letter which indicated that she had a Ph.D. So, we had no reason to question it.

Q. Who is Annette Vitale Selajano?

A. I have not idea.

Q. Do you recall filling out documents on behalf of Dr. Zamorano that were to go to Immigration and Naturalization?

A. Yes.

Q. Do you recall a document that was referred to as an H-1 checklist?

A. I remember filling out some forms, but I don't remember the specifics of the content of the documents.

Q. Do you recall that document?

A. No.

Q. Do you know who filled it out?

A. No.

Q. Did you instruct anybody to cross out Ph.D. on the H-1 checklist?

A. No. I don't remember this document.

Q. If Dr. Zamorano had a Ph.D. back in 1991, there would have been no reason to cross that out, do you agree?

MR. BERNARD: Objection, that lacks foundation. This is an immigration document.

MR. KAPLANSKY: I know.

MR. BERNARD: Well, you haven't established that he is aware of the immigration requirements or the immigration process or that he would know the reason for the form at all, let alone any individual item on the form.

Q. (BY MR. KAPLANSKY) Do you recall seeing this memo to yourself from Annette Vitale Selajano dated July 16, 1991?

A. I do not remember the document. I know that we had a lot of correspondence with the University Office for International Affairs. But I do not recall the contents or the quality of the document.

Q. Is this lady, in fact, the University International Office?

A. I wouldn't know.

Q. That memo is addressed to you, it is not?

A. Correct.

Q. Do you recall ever signing a document that looks like this H-1 petition, I think is the whole thing, do you recall ever signing a document like that?

A. I don't recall the document. I don't see my signature.

MR. KAPLANSKY: For the record, I'll be subpoenaing the document from Immigration & Naturalization. I'd like to make that Exhibit ___ whatever number is next.

Q. (BY MR. KAPLANSKY): Was it necessary for Dr. Zamorano to obtain some type of special status as a doctor of international renown so that she could stay in this county?

MR. BERNARD: Objection, no foundation. You haven't established that he's aware of the immigration requirements.

MR. KAPLANSKY: You can answer.

THE WITNESS: I believe there was a need to do something but I don't know the process. I'm not familiar with it.

Q. (BY MR. KAPLANSKY): Are you familiar with the exemption for non-residents as doctors of international renown?

A. Only that it exists, but not how it operates.

Q. To your knowledge, was that the way in which Dr. Zamorano was allowed to stay in this country in 1991?

A. It was all handled through the University office. I'm not really aware of the process.

Q. Do you know who at the office handled it?

A. No.
(Whereupon a discussion was held off the record.)

THE WITNESS: I would like to make a correction on something I said earlier. The documentation and the translation from Dr. Brock actually was given to Mr. Galvin, not to Mr. Bernard.

Q. (BY MR. KAPLANSKY): Is that something new that Dr. Brock had written?

A. Just as a result of the previous deposition we had, it was brought to my attention that the degree may not be proper. I investigated that directly with Dr. Brock. I obtained the documentation to verify the correction.

Q. Did you tell Dr. Brock that yourself and Dr. Austin are involved in this litigation?

A. I informed him that there was a suit by Dr. Austin, yes.

Q. Did you ask Dr. Brock to decline to become involved in this lawsuit?

A. No.

Q. Did you agree to pay for Dr. Zamorano's immigration lawyer?

A. Immigration?

Q. Lawyer.

A. Lawyer -- I don't recall who paid for it, I think she did.

Q. I'll show you this and ask you if that refreshes your memory.

A. It bears my signature, I don't recall what the agreement was.

Q. Is that a document wherein you agreed to pay for her immigration lawyer?

A. It's a document which states - it's called a Statement of Responsibility of Legal Costs. And it is an official University document.

Q. It bears your signature?

A. Yes.

Q. Given all those things, does it refresh your memory as to whether you agreed to be responsible for the payment of the immigration lawyer?

MR. BERNARD: You mean Dr. Diaz personally or the Department of Neurosurgery?

MR. KAPLANSKY: He signed it.

MR. BERNARD: As Chairperson of the department and it says sponsoring department, at the top of the page.

MR. KAPLANSKY: Fine, has the department agreed to be financially responsible?

THE WITNESS: I don't recall the agreement, but I think that that would indicate that the department may have paid for it, I don't remember.

Q. (BY MR. KAPLANSKY): Do you recall why the department agreed to pay for Dr. Zamorano's immigration attorney?

A. No.

Q. Given that you spoke to Dr. Brock with a view towards straightening out what Dr. Zamorano's degree was, did you question her as to how this kind of a mistake could have occurred and you would have called it a Ph.D. under circumstances when it wasn't?

A. I inquired of her what the discrepancy was between what I heard from you at the deposition and what she had told me. She believed that the correct translation for the degree was that of a Ph.D. based on Dr. Brock's letter submitted to Dr. Busman, A-U-S-M-A-N, prior to her arrival or shortly after her arrival at Ford Hospital. So, her belief was founded on the letter of communication from Dr., Brock to Dr.

Busman. Based on that, I inquired further of Dr. Brock and was corrected on the proper terminology.

Q. Where did you meet with Dr. Brock?

A. In Madrid, approximately two months ago.

Q. That would have been in April of this year?

A. Thereabouts.

Q. He agreed to meet you there?

A. No, we were having an International World Health Organization meeting there that we belong to.

Q. So, you just happened to bring it up as long as –

A. Yes, correct.

Q. Have you gone back now through – well, did you question Dr. Zamorano, she is a very bright lady, as I understand. Did you question her in terms of how she could have misinterpreted the degree that she received from Frie University as a Ph.D.?

A. Again, it was based on the communication from Dr. Brock to Dr. Busman, which stated specifically that it was a Ph.D. So she took that to be correct.

Q. Didn't she know what kind of degree she got from Germany?

A. I can't tell.

Q. The thesis that was contained in her degree, Chemonucleolysis, was it?

A. I think so.

Q. Is that a procedure that is still followed in the United States?

A. I think to a limited degree.

Q. It's kind of obsolete?

A. I don't know if it is obsolete as much as not as commonly used.

Q. Did, based on this new information in her -- have her, Dr. Zamorano's documents been amended to reflect she does not have a Ph.D.?

A. Yes.

Q. How have they been amended?

A. To indicate that it is a Doctor of Medicine.

Q. Is this a formal document that has been added to her personnel file?

A. No, we have just corrected all the letterhead.

Q. Let's talk about her personnel file.

Has the personnel file been formally corrected to indicate that she does not, in fact, have a Ph.D.?

A. We just added the information from Dr. Brock to her personnel file and just left it there.

Q. How about her licensing documentation --

A. It doesn't change her license.

Q. I didn't finish my question.

A. I'm sorry.

Q. Has her licensing information on file in Lansing or wherever, Lansing, has that been amended to indicate that there was an error in her credentials and she is not a Ph.D.?

A. Are you finished?

Q. Yes.

A. It has no bearing on her license.

Q. So, the answer is no, nothing has been done with respect to that file?

A. Correct.

Q. Do you plan on doing something with respect to that file?

A. Yes.

Q. Has she been instructed to do something with respect to that file?

A. No.

Q. Based on the error in terms of the nature of her degree, have you had occasion to look into any other areas of her education, her training, for the purpose of verification?

A. No, no anything beyond that, no.

Q. Well, have you – this is a pretty serious thing, is it not, especially in the world fo academia, where one professes to have a Ph.D. and turns out not to have a Ph.D.?

A. I think it is a reasonable oversight based on Dr. Brock's letter.

Q. You would agree with me that the degree speaks for itself, it's not something that typically has to be translated so that the recipient knows what they got?

A. Since I don't speak German, I cannot tell you what the German language says. And most people in this country probably would have the same problem.

Q. Have you had occasion to have her degree translated independently?

A. Yes.

Q. By who?

A. By a German translator.

Q. Who would that be?

A. I don't know the name, it was somebody recommended to us by the German Consulate.

Q. Did you get it in writing?

A. Yes.

Q. Who has possession of that?

A. Mr. Galvin.

Q. Dr. Zamorano presented us with this translation by Rita Holmes, do you know who Rita Holmes is?

A. No.

Q. Have you been made aware that Dr. Austin has also retained a translator recommended by the German Consulate who has also translated, have you been made aware of that?

A. No.

Q. Let me show you what has been translated by Mr. Ilanberg (phonetic) and let me just ask you to compare those two.

(Whereupon a discussion was held off the record.)

Q. (BY MR. KAPLANSKY): Have you had an opportunity to compare these two, the Rita Holmes and the Ilanberg translation?

A. Yes.

Q. Are they, in your opinion, significantly different?

A. They indicate different qualities to the degree. Once indicates a Doctor of Medicine and the other one indicates a Doctor of Philosophy in the field of medicine.

Q. Did you ask Dr. Brock if such a Ph.D. is available in Germany?

A. Apparently the Ph.D., as we recognize it, only exists in this country. It's granted by the graduate school of the American universities and it is independent of the other schools. The degrees, the advanced degrees in medicine and I believe in law and in other areas, are granted directly by the medical school or the law school. And, so, there is no equivalency because there is . . .

* * *

Pages 37-42

A. I couldn't tell you.

Q. When did you first find out about the report?

A. The report?

Q. To Licensing & Regulation.

A. It may have been a year ago or a year and a half ago.

Q. How did you find out about it?

A. Through different people calling me to inquire about why they were being called to a conference by a representative of the Commerce Department to answer questions regarding Dr. Zamorano.

Q. During that time period you never formed an opinion as to what may have brought that about?

A. I asked them whether they knew what was the basis of this because I think I was the last person to be interviewed in the process. And every person I asked said they had no idea, that they individually had inquired and they had been told that it was a confidential matter.

Q. You became aware that Dr. Austin wrote a letter to Keith Crane (phonetic)?

A. Specifically about?

Q. Complaining about Dr. Zamorano in limiting privileges?

A. I don't think I'm aware of that communication.

Q. Have you ever seen this Certificate?

MR. BERNARD: This Certificate, is that what you said?

MR. KAPLANSKY: Yeah, it's called a Certificate.

THE WITNESS: I believe this is a copy of a document similar to the one we have in her file regarding a letter that I believe originally was written in German by Dr. Brock.

Q. (BY MR. KAPLANSKY): As a translation?

A. That's what I recall it being.

Q. Do you recall Dr. Brock's April 25th letter to Dr. Austin where he discussed this Certificate and mentions that there's nothing similar in her personnel file in Germany?

MR. BERNARD: He testified he never saw that letter. Why don't you read that letter.

MR. KAPLANSKY: Have you read it?

THE WITNESS: Can you ask the question again?

Q. (BY MR. KAPLANSKY): Dr. Brock makes reference to the Certificate, doesn't he?

A. It mentions here that the translation is not correct, according to the original in German.

Q. Dr. Brock makes reference to his doubts as to Dr. – rephrase that. Dr. Brock makes reference to Dr. Zamorano's integrity, does he not?

A. There is a statement there that references that. I don't know how it can be interpreted.

Q. He references that because the Certificate is not accurate, is that true?

A. I think he questions it.

Q. It also indicates there is not a copy of it in her file in Germany, is that true?

A. Yes.

Q. The fact that Dr. Brock questions her integrity, has that caused you to question her integrity in terms of the integrity of her credentials?

A. Well, as a result of your prior questioning in your previous deposition, I became concerned and I inquired directly of Dr. Brock to determine what the nature of these concerns were.

Q. Given the turn of events with respect to the Ph.D. issue, did you have occasion to look at some of the other credentials of Dr. Zamorano to see if – let me finish and then you can object.

MR. BERNARD: I though you were done and that's why I stopped.

Q. (BY MR. KAPLANSKY): Given the events that occurred with reference to the Ph.D., did you have occasion to look at some of Dr. Zamorano's other credentials to determine if they were, in fact, accurate?

MR. BERNARD: Objection, asked and answered, he said he didn't. Next question.

THE WITNESS: No.

Q. (BY MR. KAPLANSKY): According to the personnel file, Dr. Zamorano's personnel file, Dr. Zamorano did a three-year residency in general surgery, do you recall that?

A. Not off the top of my head, no, I would have to look at the documentation.

Q. Did Dr. Zamorano do a neurosurgery residency in Germany?

A. In Germany?

Q. In Germany.

A. No.

Q. For what period of time did she do a neurosurgery residency in Chili?

A. I don't recall the exact numbers off the top of my head.

Q. If she graduated from medical school in 1980 and completed a general surgery residency at the end of 1983, would you agree that doesn't give her a lot of time to do a neurosurgery residency also?

A. As of when?

Q. As of the end of 1983, before she went to Germany.

A. I believe that the residency that she did was in the Department of Surgery in the Division of Neurosurgery.

Q. What country are you referring to?

A. In Chile.

Q. That lasted for six months, did it not?

A. No. It lasted for several years.

Q. So, are you saying that she did a neurosurgery residency within her general surgery residency, all within the context of three years?

A. The structure of many departments is different in different locations. Even within our country or, for instance, the University of Michigan does not have a Department of Neurosurgery as such. There is a Department of Surgery, of which Neurosurgery is a section. I believe the Department of Surgery in Chile, where she attended and which probably awards the degree, is the one that gave the degree in Neurosurgery within the Department of Surgery. Because that is a division of the Department of Surgery.

Q. And this entire training process would have been three years?

A. I can't recall the numbers.

Q. Let me show you this page from Dr. Zamorano's file. Have you read it?

A. Yes.

Q. Would you agree with me that her entire general and neurosurgery training in Chile was a total of three years?

A. No, I think you're misreading what this document says. This document very specifically states, and I quote, "The Dean of the School of Medicine in charge of the Pre and Post Graduates Education Program of the Catholic University of Chile, certifies that Dr. Lucia Zamorano Rodriguez, R-O-D-R-I-G-U-E-Z, has successfully completed a residency in surgery with the

speciality in neurosurgery on the 31st of December of 1993, which to me means she did a residency in neurosurgery.

Q. For how long?

A. I doesn't indicate the beginning.

* * *

Pages 61-63

A. It's part of a national multi-center study.

Q. Are you involved with any grants along with her?

A. No.

Q. Did you assist her in petitioning for the grants?

A. No.

Q. This is something she would have done on her own?

A. Yes.

Q. Is her salary subsidized by Harper?

A. Yes.

Q. So, whatever the University pays to her, Harper pays to the University?

A. I believe so, yes.

Q. To your knowledge, is she currently a citizen, is Dr. Zamorano a citizen now, a U.S. citizen?

A. I don't know.

Q. Have you ever been approached by Dr. Adamani (phonetic) with reference to complaints made by Dr. Austin about Dr. Zamorano?

A. No.

Q. The substance of the brochure, was that placed on the Internet?

A. Yes.

Q. By whom?

A. By me.

Q. At what period did that occur?

A. I believe that was recently done within the last six months.

Q. Was it done since this lawsuit began?

A. Yes, very recently.

Q. And that is something in which -- did you actually do it or did you instruct someone to do it?

A. One of our computer engineers.

Q. You are familiar with the Internet?

A. Not really enough.

Q. Do you know how many people it reaches?

A. I have no idea.

Q. Do you own a computer at home?

A. Yes.

Q. Are you what one would call computer literate?

A. Not really, I'm more like a car driver, I can turn it on and run a few things but that's all.

Q. Do you know how to access the Internet?

A. Yes.

Q. Do you understand what Worldwide Web is?

A. It's just a network of communication.

Q. Do you know if that network communicates with literally millions of computer users?

A. I would imagine so, yes.

Q. Do you know how much money Dr. Zamorano generates that goes into your P.C.?

A. No.

Q. Would it be in excess of half a million dollars?

A. Yes, probably.

Q. Would it be in excess of a million dollars?

A. Probably in that area but not too much in excess of that.

Q. Is she the top money generator within the P.C.?

A. Very close, I think, Dr. Zamorano, Guthikonda and I, and Dr. King are very much the same level.

Q. I'm not sure I'm -- go back on one question here.

The Internet posting, was that the same material as is in the brochure?

A. It's a synthesized version.

Q. Was that placed on the Internet since this lawsuit began in August of last year?

A. Within the last six months.

Q. So, that means it has been since this lawsuit began?

A. Within the last six months.

Q. You have a position within the DMC, too, as I recall?

A. Yes.

Q. What is that?

EXCERPT OF DEPOSITION OF ROBERT SOKOL
February 15, 1996

* * *

Pages 17-20

. . . and also directly to the president of the university which is required by LCME.

Q. What is LCME?

A. It's the accrediting both, the national accrediting body.

Q. To whom do you report on the DMC side?

A. To the CEO of the medical center.

Q. Who is that?

A. David Campbell.

Q. On the university side who is immediately under you?

A. Universities are not organized that way. The answer is I have a staff. I have some associate deans and assistant deans. There are chairs. In many ways the dean works for the chairs. The job is to make sure that people can get their jobs done. There's a faculty, full-time real faculty, also voluntary faculty not under me.

Q. On the DMC side same the question. Who is below you? Is this a staff situation or what?

A. There are some vice presidents who - It's a corporation and it would be listed in the organizational chart as direct reports. There are a number of other operating officers who relate on a dotted line relationship to the senior vice president for medical affairs. The senior vice president for medical affairs chairs the medical board which functions pretty much like the medical center-wide executive committee, medical executive committee. We have all of the attending physicians some of whom are full-time faculty, some of whom are fractional-time faculty, some whom are voluntary faculty, and some of whom have no faculty relation at all but are attending physicians, and the various hospital staffs and ambulatory care site staff.

Q. Are you compensated for your role at DMC?

A. Yes.

Q. Is this a salary type of thing?

A. Yes.

Q. And your compensation is dean?

A. Yes.

Q. Is that a salary?

A. Yes.

Q. Does that fluctuate?

A. Not as much as I would like. Yes. Well, I mean there's a salary. I'm paid the same way any other professor is.

Q. Now, I want to try to understand if I may the relationship between the university and Harper Hospital. Can you more or less summarily describe that relationship?

A. The relationship as between the university and the medical center at Harper Hospital exists as a wholly owned part of the Detroit Medical Center and has been for many years. There's a master affiliation agreement. There's a contractual arrangement between Wayne State University, not the School of Medicine but between Wayne State University and the Detroit Medical Center.

Q. And the year of that master affiliation agreement is what?

A. I don't know with precision. It was last updated probably in the late '80's I guess.

Q. If I were to suggest 1985, would that be about correct?

A. No. I think it's been updated since then. There was an '85 version I think. That's close enough.

Q. What is your understanding of the purpose of this affiliation?

A. The affiliation agreement is designed to put the university and the Medical Center into partnership vis-a-vis meeting the admissions of both organizations and operating an academic health system.

Q. I'm going to try to ask this simply. What does each party do?

A. The university carries more responsibility in the partnership for oversight of research and education to the core central parts of the university responsibility, expertise. The medical center carries primary responsibility for clinical practice, for providing an environment for clinical practice. Of course you can't teach without having an environment for clinical practice. Other places often universities own medical centers and sometimes medical centers own universities. Own the medical schools at least.

Q. Which is the situation here?

A. Here it's the master affiliation agreement.

Q. What is University Health Services?

A. I don't know.

Q. University Health Center?

A. It's a part of the Detroit Receiving Hospital University Health Center which is owned by the . . .

* * *

APPENDIX L

BROCHURE

WAYNE STATE UNIVERSITY

NEUROLOGICAL SURGERY DEPARTMENT

. . . a commitment to excellence

WAYNE STATE UNIVERSITY

NEUROLOGICAL SURGERY DEPARTMENT

...a commitment to excellence

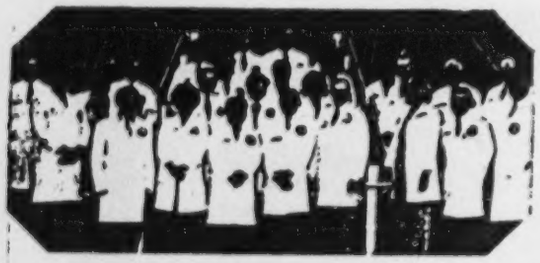
EXHIBIT

EXHIBIT # 1 Brayton

DATE 4/18/96 REP.

Wayne State University
School of Medicine

Wayne State University
DMC The Detroit Medical Center



THE MISSION OF THE WAYNE STATE UNIVERSITY NEUROLOGICAL SURGERY DEPARTMENT

"The enduring goal of the Neurological Surgery Department at Wayne State University is founded on excellence — going far beyond the call of duty, doing more than others expect. This is what excellence is all about. We strive to maintain the highest standards in clinical skills and innovative research, looking after the smallest detail, going the extra mile."

"Excellence means caring. We are dedicated to compassionate care for our patients, treating every person as if he or she were our own family members. We are devoted to exceptional education in the neurosciences, and are committed to the progression of neurosurgical advancements both nationally and internationally. At Wayne State University, the Neurological Surgery Department is driven by principles of integrity, inquiry and respect to achieve excellence — to make a special effort to do more for those we serve."

HISTORICAL PERSPECTIVE

The present training program in neurosurgery at Wayne State University has a rich heritage and was founded by Dr. E. Stephen Gurdjian in 1946 at Grace Hospital in Detroit. Dr. Gurdjian was born in Smyrna, Asia Minor, in 1900 and came to Michigan in 1920 where he entered the University of Michigan Medical School. Dr. Gurdjian worked with Drs. Carl G. Huber and Elizabeth C. Crosby, both legendary figures in neuroanatomy. He graduated with his M.D. in 1926 and his Ph.D. in 1927. Dr. Gurdjian's doctoral dissertation, "The Diencephalon of the Rat," continues to be cited in neuroanatomical papers.

Dr. Gurdjian then entered neurosurgical training at the University of Michigan under Dr. Max Peet, who had received his neurosurgical training from Dr. Charles Frazier at the University of Pennsylvania.

Following completion of this training, Dr. Gurdjian started practice in the city of Detroit with much of his work involving trauma at Detroit Receiving Hospital. It was this association that led to his major contribution to the treatment and understanding of the mechanics of head injury. He aligned himself with Drs. Herbert Lissner, Lawrence M. Patrick and Voigt Hodgson, all of the Department of Engineering Mechanics at Wayne State University. This group produced major innovations in the research of head injury, which led to the improvement of care for the head-injured patient.

Dr. Gurdjian was the honored guest of the Congress of Neurological Surgeons in 1971 following his retirement as chairman in 1970. At that time, his bibliography included 326 publications, a testimony in itself to his scholarly activity.

Dr. L. Murray Thomas, a former resident of Dr. Gurdjian, succeeded him as professor and chairman in 1970. Dr. Thomas continued the head injury research in association with Dr. Hodgson. Dr. Thomas also brought the Neurological Surgery Department into its present microscopic realm, and was noted as a superb technician and clinician.

Dr. Thomas was succeeded by Fernando G. Diaz, M.D., Ph.D., in 1990 as professor and chairman. Under Dr. Diaz, the Neurological Surgery Department achieved the ultimate in technology and the largest staff ever. The number of cases per year has increased several fold. The scholarly activity also has increased, as witnessed by the numerous presentations made nationally and internationally several times each year. Our future is bright and exciting as we continue our tradition of excellence.

by Steven D. Ham, D.O.

Wayne State University
School of Medicine

Fernando G. Diaz, M.D., Ph.D.
Professor and Chairman

Neurological Surgery
Department
University Health Center
4201 St. Antoine, 6E
Detroit, Michigan 48201
Office: (313) 745-4661
Fax: (313) 745-4099

Dear Friends:

Through the years, the Wayne State University Neurological Surgery Department has been a prominent leader in the care and treatment of patients with neurosurgical disorders. We have built our organization on excellent clinical skills, exciting research and advanced education in the neurosciences.

Our first chairman of neurosurgery, Dr. E. Stephen Gurdjian, was a neurosurgical pioneer, establishing the standards of excellence that we remain committed to in the present. Dr. Gurdjian founded the Neurological Surgery Department in 1946, and by fostering the development of expert clinical practice, research and dedication to the patient, he initiated our tradition of excellence.

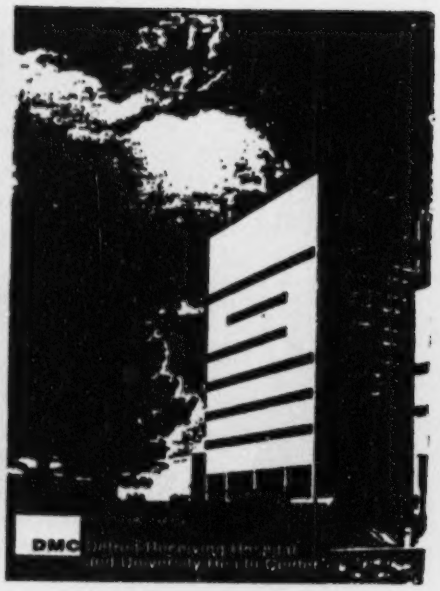
Today, we remain committed to the advancement of neurosurgical expertise through our involvement in vital international research and education of the medical professional. Our neurosurgical staff brings together the brightest and most talented group of physicians and ancillary staff dedicated to a continuum of neuroscience care that strives to exceed the expectations of those we serve.

Dr. Gurdjian would be proud of what we have accomplished, and delighted to see that we have continued to push higher up, and further on. On these pages, you will see that our challenge is to continue to pursue our goals through the constant effort to bring first-class patient care, education and research to our community, our nation and our world.
Dr. Gurdjian's grand visions have led to our great accomplishments.
The Neurological Surgery Department has indeed made a commitment to conquer the heights of excellence.

Sincerely,

Fernando G. Diaz, M.D., Ph.D.
Professor and Chairman

DMC The Detroit Medical Center

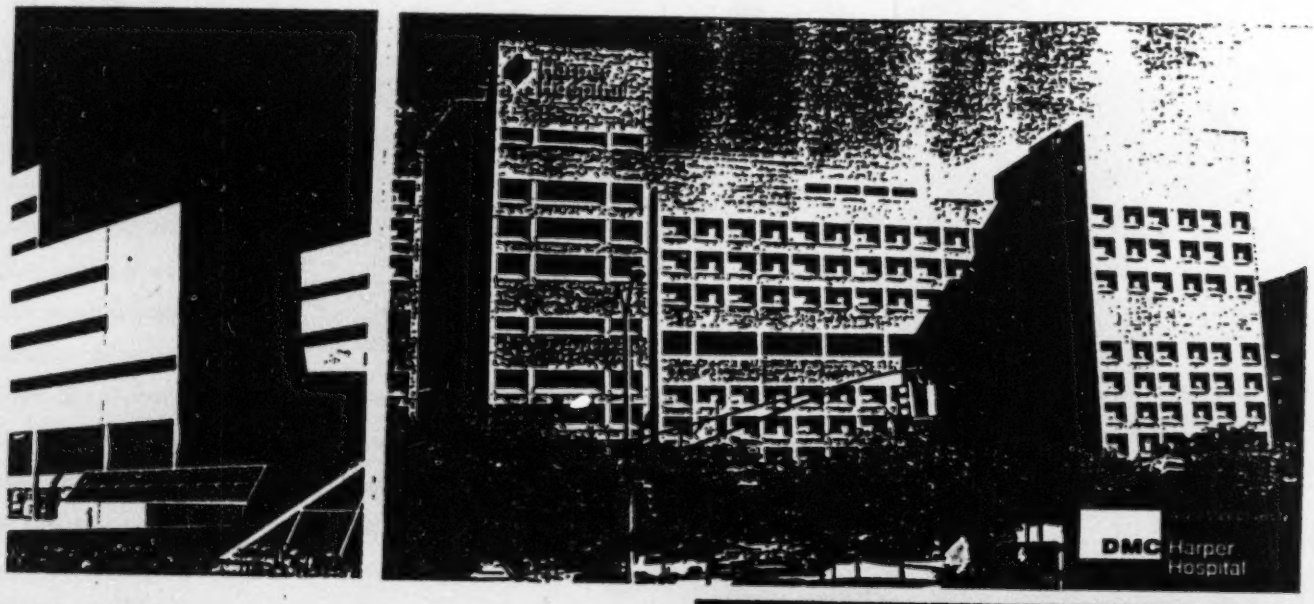


CHILDREN'S HOSPITAL OF MICHIGAN is a 260-bed hospital housing one of the largest pediatric health care facilities in the United States, and the only freestanding Level I pediatric trauma center in Michigan. Children's is a major neurosurgical referral center for craniofacial reconstruction, myelodysplasia and pediatric neurotrauma. Children's Hospital offers one of the first nationally approved fellowships in pediatric neurosurgery.

DETROIT RECEIVING HOSPITAL specializes in adult emergency and trauma care. The 340-bed facility is recognized as a Level I trauma center, featuring specialty units for neurotrauma patients. The Spinal Cord Injury Unit and Traumatic Brain Injury Unit specialize in the latest technological and research advances. Reconstructive spine procedures, including instrumentation and implantation, and all neurosurgical trauma procedures are performed at Detroit Receiving Hospital. The latter are aided by the addition of a 12-bed Neurotrauma Intensive Care Unit.

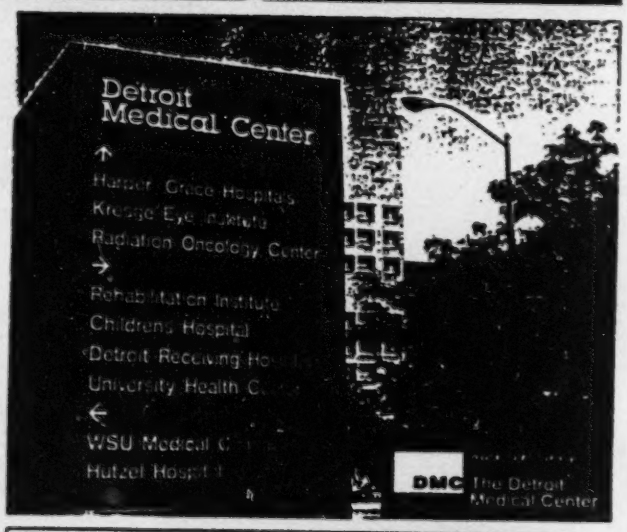
HARPER HOSPITAL is a 713-bed acute care facility serving adult medicine and surgery with a major emphasis on the neurosciences. Harper is internationally known for surgical treatment of complex neurovascular problems, and endovascular treatment utilizing state-of-the-art invasive neuroradiology. Stereotactic and radiological procedures are performed here via fully integrated computer networks.

GRACE HOSPITAL serves a diverse population of neurosurgical patients in a private practice setting. Located in northwest Detroit, the 551-bed community hospital is dedicated to the practice of general neurosurgery, with an emphasis on spinal reconstruction.



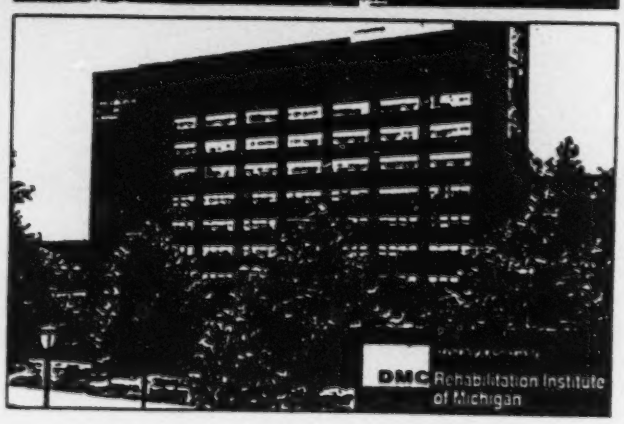
THE DETROIT MEDICAL CENTER

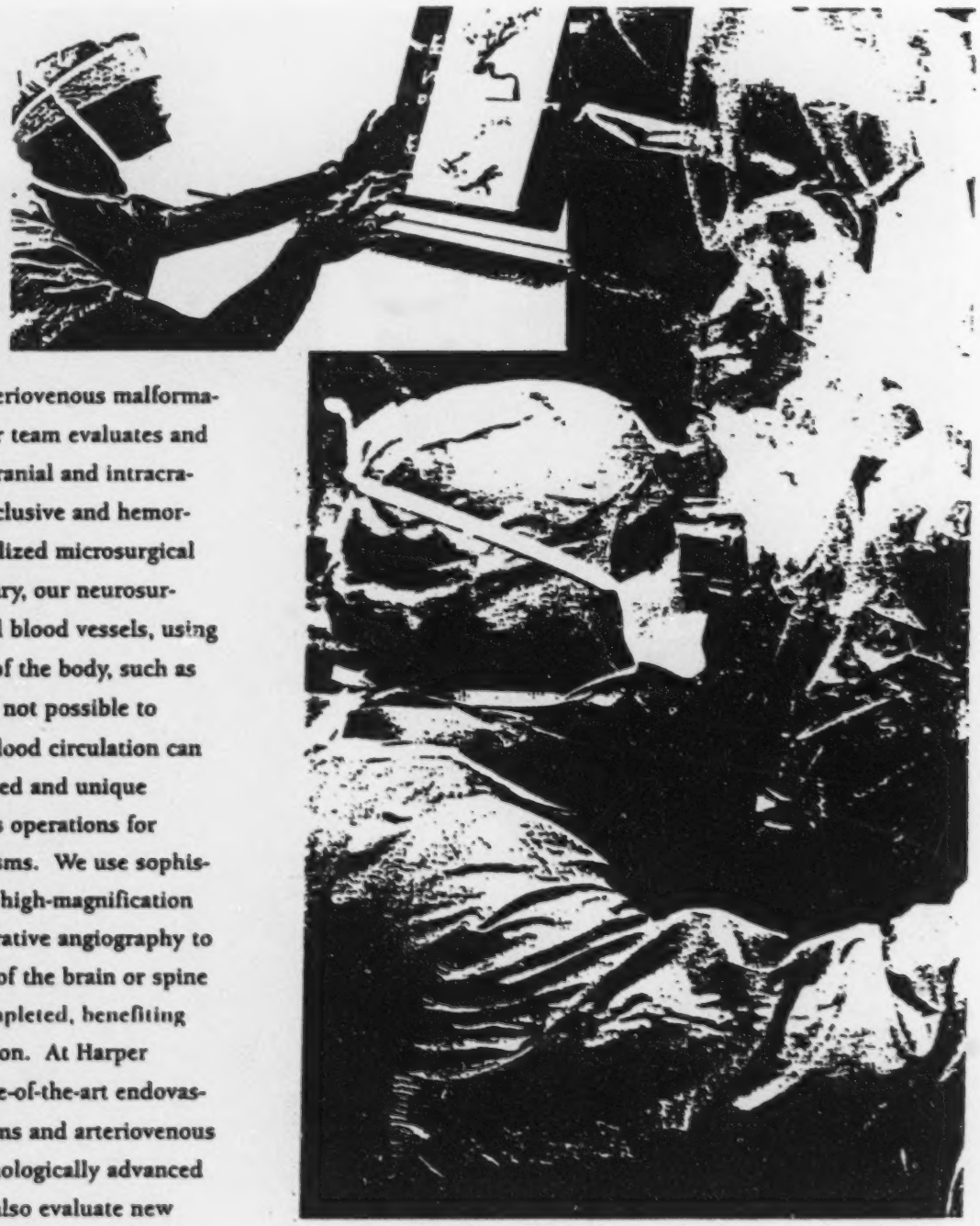
The Detroit Medical Center (DMC), the academic health center of Wayne State University (WSU), is one of the largest health care systems in the United States. Five of the seven hospitals of the Detroit Medical Center and the Wayne State University School of Medicine provide the clinical base for the academic and research programs of the Neurological Surgery Department. The Veterans Administration Hospital, currently under construction and scheduled for completion in 1995, will provide an additional 580-bed facility for neurosurgical tertiary care services for the veteran population of southeastern Michigan. Huron Valley Hospital, a 153-bed facility located in Commerce Township, provides general neurosurgical care to community residents.



REHABILITATION INSTITUTE OF MICHIGAN

is the largest 155-bed specialty hospital in the midwest for treatment of adult physical medicine and rehabilitation. Comprehensive and coordinated care for traumatic brain injury, spinal cord injury, stroke and other surgical conditions are expertly provided by the largest team of rehabilitation professionals in Michigan.

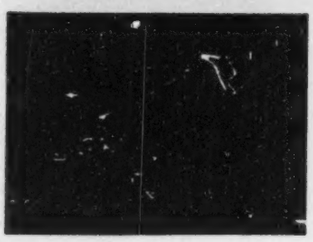




Cerebrovascular Disorders

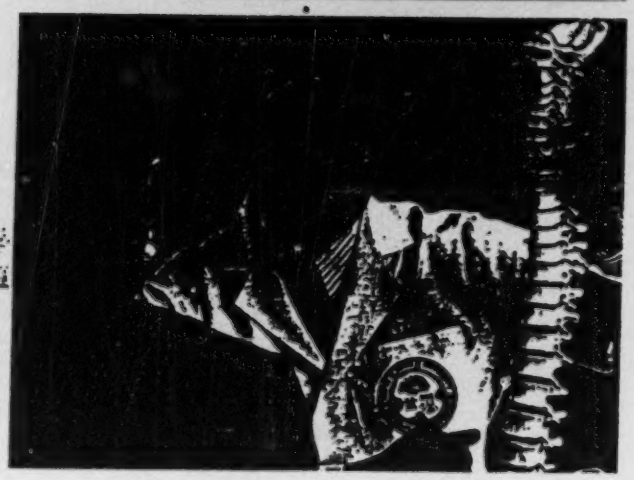
The cerebrovascular program at Wayne State University has an established national and international reputation in the treatment of patients with stroke, aneurysms and arteriovenous malformations. The cerebrovascular team evaluates and treats patients with extracranial and intracranial vascular problems, occlusive and hemorrhagic, using highly specialized microsurgical techniques. When necessary, our neurosurgeons can rebuild damaged blood vessels, using vessels from another part of the body, such as the foot or leg. When it is not possible to reconstruct vessels, then blood circulation can be rerouted using specialized and unique approaches, such as bypass operations for patients with giant aneurysms. We use sophisticated micro-instruments, high-magnification microscopes and intra-operative angiography to check vascular circulation of the brain or spine before the operation is completed, benefiting the patient and neurosurgeon. At Harper Hospital, we also offer state-of-the-art endovascular treatment of aneurysms and arteriovenous malformations in our technologically advanced neuroradiology suite. We also evaluate new forms of treatment for stroke and vascular disorders, and are committed to providing the patient with expertise and excellence in care.

The neurosurgeons at Wayne State University, working in one of only two hospitals in the United States dedicated to emergency and trauma care, manage thousands of patients annually with spinal cord and head injuries. Detroit Receiving Hospital is Michigan's busiest adult emergency center, and is a Level I Trauma Center, as designated by the American College of Surgeons. A state-of-the-art, 14-bed Neurotrauma Intensive Care Unit recently opened, staffed by a multi-disciplinary team of critical care providers. The Neurological Surgery Department is one of only 10 national study centers for the evaluation of lazaroids in the management of traumatic brain injuries and is also affiliated with the Rehabilitation Institute of Michigan through a federal Traumatic Brain Injury System grant. We also are committed to injury prevention by our involvement in the "Think First" trauma prevention program. Wayne State University neurosurgeons demonstrate commitment to excellence of neurotrauma care, research, education and injury prevention.

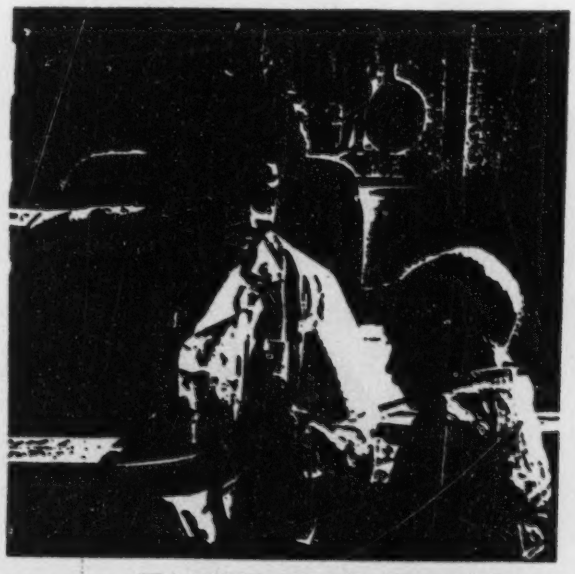


Neurotrauma of the Spine and Brain

Neurosurgeons from the Wayne State University Neurological Surgery Department perform hundreds of spinal surgery cases every year, ranging from herniated discs to complex reconstruction of the spine involving state-of-the-art instrumentation. Of 18 neurosurgical centers nationwide performing specialized spinal reconstruction and instrumentation procedures, Wayne State University is one of only eight high-level, unified centers, providing a comprehensive neurosurgical approach integrating microneurosurgery, fusion and instrumentation. Using innovative microsurgical and laser techniques, we treat complex disorders involving tumors, sports injuries, instability and stenosis. Our neurosurgeons can decompress, realign and stabilize the spine through a variety of anterior and posterior approaches. We are committed to the successful management of all spinal problems, providing maximal patient recovery.



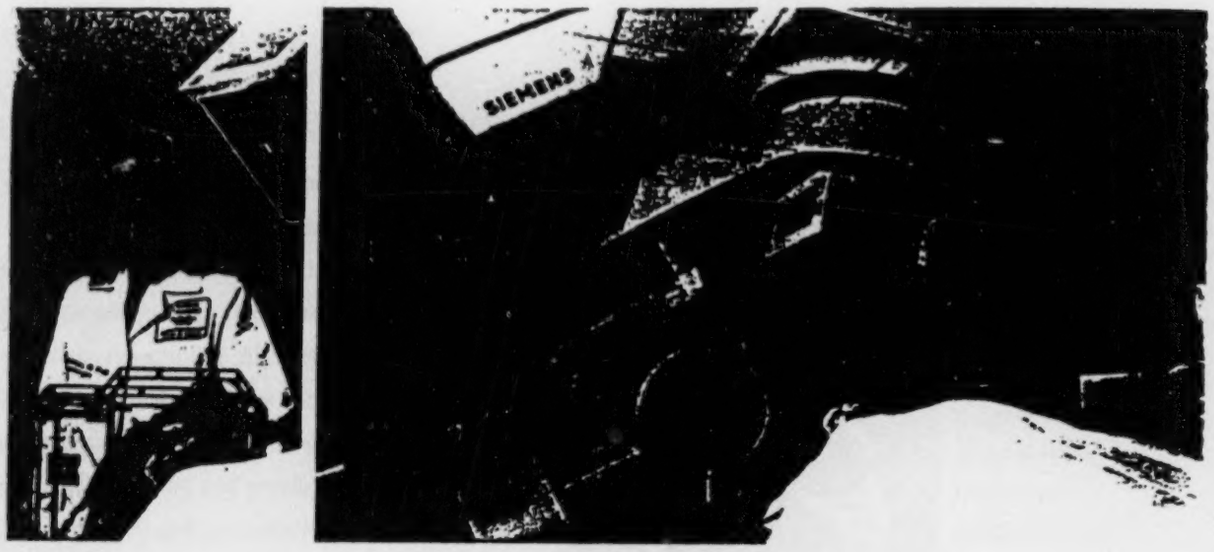
DISORDERS OF THE SPINE



The pediatric neurosurgeons of the Neurological Surgery Department are based in one of the nation's largest pediatric neurosurgical centers, Children's Hospital of Michigan, and perform more than a thousand neurosurgical procedures every year.

Using a multi-disciplinary team approach, our neurosurgeons evaluate and treat children with a variety of neurosurgical problems, including tumors of the brain and spinal cord, spina bifida, hydrocephalus, craniofacial disorders, uncontrollable seizures and vascular abnormalities. Wayne State University pediatric neurosurgeons are noted for their expertise in craniofacial reconstruction and reconstruction of congenital malformations of the spine. We also developed applications for neuroendoscopy and minimally invasive surgery. Our pediatric neurosurgeons are determined to provide their patients with optimal care, expertise and compassion, as if they were their very own children.

PEDIATRIC NEUROSURGERY

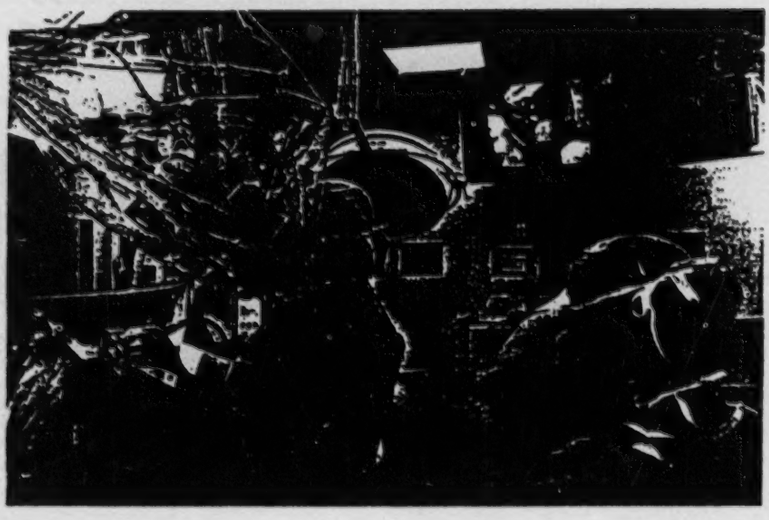


The stereotaxis and radiosurgery programs for neurological surgery at Wayne State University offer selected patients with certain brain tumors and intracranial lesions an advanced technological alternative to conventional neurosurgery. Stereotactic radiosurgery enables the neurosurgeon to precisely locate brain lesions with computer imaging equipment and use defined beams of radiation from a linear accelerator to treat the lesion without making an incision. This procedure, which takes about a day and generally requires only an overnight hospital stay, has revolutionized neurosurgery and is being used to help patients with vascular lesions, such as arteriovenous malformations, and for both benign and malignant brain tumors. It is often effective for treating disorders that are otherwise inaccessible by conventional neurosurgery, or on patients for whom conventional procedures are medically inadvisable. The gamma knife, a machine that will focus 201 radiation beams on a specific target, is located at Harper Hospital. This technologically advanced machine is dedicated exclusively to neurosurgical problems, and spares the tissue surrounding the tumor or brain disorder. Our neurosurgeons, known internationally for research and development of stereotactic techniques and equipment, work as part of a multidisciplinary team to bring innovative techniques and the most up-to-date treatments to our patients. Neurosurgical patients are further benefited by the use of computer-assisted techniques developed at Harper Hospital, such as the infrared-based system. Infrared cameras are used to track in real-time, the position of surgical instruments and the surgical microscope on computer images of CT, MRI, and angiograms, enabling the neurosurgeon to remove brain lesions that otherwise would not be removeable with conventional techniques. We were the first in this region to offer this non-invasive service.

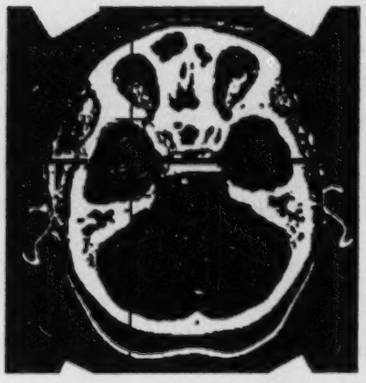
Computer-Assisted Surgery and Stereotactic Radiosurgery

Laser-Assisted Neuroendoscopy

Wayne State University neurosurgeons are pioneers in the developing specialty of treating tumors and intraventricular disorders with laser-assisted neuroendoscopic procedures. Our neurosurgeons work as scientists in developing this new technology to accomplish minimally invasive techniques. We have applied laser technology to treatment of both children and adults with tumors and cerebrovascular, spine, skull base, epilepsy and pain disorders. With expertise in laser-assisted neuroendoscopy, patients can be treated and experience reduced recovery times. Our goal is to continue to research and develop this exciting specialty in neurosurgery for the betterment of our patients who will benefit from this minimally invasive technology.



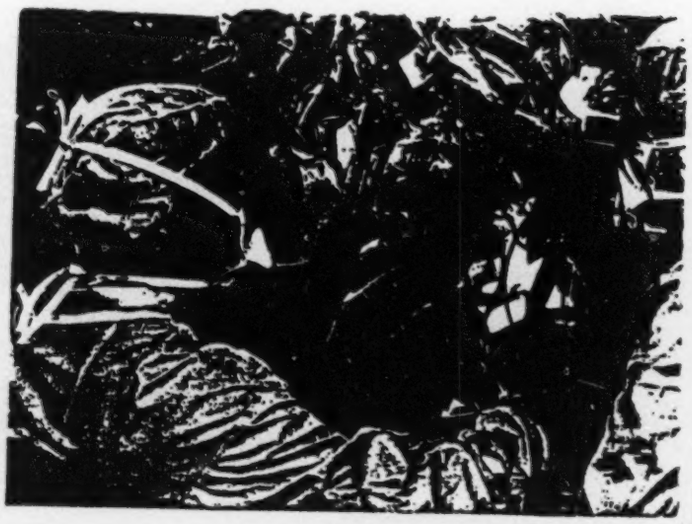
Interstitial Brachytherapy



The neurosurgeons at Wayne State University have the expertise to combine stereotactic radiosurgery with radiation therapy, known as brachytherapy, to treat brain tumors from inside the tumor. This procedure involves implanting tiny radiation seeds into the brain tumor, using internal radiation to kill cancerous tissue. The goal is to kill tumor tissue with the seeds, minimizing damage to the surrounding healthy brain. Sometimes, the neurosurgeon removes the tumor and then implants the radiation seeds to destroy any remaining cancer cells. Our neurosurgeons are at the forefront of this technology to safely treat brain tumors with the utmost skill and competence.

Epilepsy Surgery

The Neurological Surgery Department at Wayne State University has developed a surgical management program for epilepsy patients whose seizures cannot be controlled by medication. Through a team approach, our neurosurgeons determine if surgery is an appropriate alternative for treatment by identifying abnormal brain tissue. This abnormal tissue, which causes the electrical impulses of the brain to "misfire," is surgically removed with stereotactic computer-assisted surgery. When the defective tissue is removed, patients experience fewer and less severe seizures; in many cases, seizures are eliminated. We also are researching procedures to help patients who have epilepsy, but no identifiable abnormal tissue in the brain. Our goal is to be able to help all people with epilepsy live a normal life without fear of uncontrollable, violent and harmful seizures.



Pain and Neurosurgery

The neurosurgeons at Wayne State University evaluate and treat a variety of unusual and chronic pain conditions. Facial pain, known as trigeminal neuralgia, is successfully treated with microsurgical techniques or through needle injection and electrical lesion of the nerves, with minimal side effects. Our neurosurgeons also perform intricate procedures at different levels of the nervous system for pain control, and have developed programs for patients with intractable pain using continuous drug infusions. We continue to research and develop new technologies, such as laser-assisted procedures, to treat and help our patients who must deal with pain.

Skull Base Neurosurgery

Wayne State University neurosurgeons are at the forefront of technology which offers a safe and successful means of removing formerly inoperable brain tumors through skull base surgery. Prior to skull base surgical applications, many tumors were considered inaccessible, and therefore inoperable. Our neurosurgical group provides the most comprehensive team of skull base surgery specialists in Michigan. Using highly specialized equipment at Harper Hospital, such as an infrared localizer to constantly verify location of vital structures near the skull base during surgery, Wayne State University neurosurgeons treat patients with a variety of lesions close to the base of the skull. Benign and malignant tumors, pituitary tumors, acoustic neuromas and complex aneurysms are approached in complex paths through the nose, the ear, the face, including the orbit of the eye, and the mouth by removing parts of the bone around these structures. This allows our team to reach difficult areas of access without injuring the brain. Our skull base surgeons have radically improved the chances for cure, shortened the necessary recovery time, and restored normal lifestyles to people who were often left with no hope for treatment.

Neurosurgical Ambulatory Care

The Neurological Surgery Department at Wayne State University staffs a network of nine neurosurgical clinics to provide care for our patients. Our neurosurgeons, nurses and physician assistants evaluate and treat patients in the Harper Professional Building, adjacent to Harper Hospital, in Detroit, providing speciality clinics for vascular, oncology, trauma, spine and skull base neurosurgical disorders.

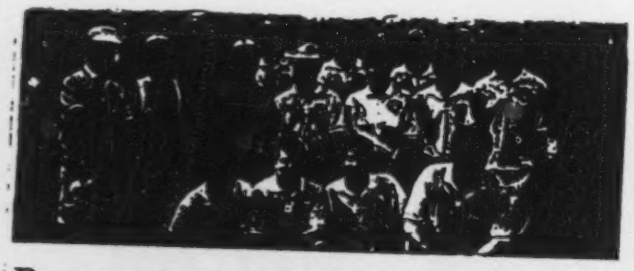
At Children's Hospital, our neurosurgeons staff a multi-disciplinary pediatric neurosurgical clinic, as well as a comprehensive myelodysplasia clinic. For our patients in northwest Detroit, we provide outpatient care at our clinic located in Grace Hospital. Our neurosurgical staff also sees patients at the Detroit Medical Center facility located in Novi, northwest of Detroit, at the Novi Health Care Center.

Advanced Neuroscience Research

At Wayne State University, the Neurological Surgery Department continues the tradition of research begun by Dr. E. Stephen Gurdjian. We are dedicated to a search for new knowledge and refinement of existing knowledge, committed to excellent care and treatment of our patients. This commitment is reflected through our involvement in several research projects, obtaining federal and private grant monies for all ongoing research projects.

Basic science research in our neuroanatomy labs includes the investigation of basal ganglia connections, variability of blood supply to the basal nuclei and neuronal plasticity in the endocrine hypothalamus. We also are studying anatomical models of skull base anatomy, microsurgical anatomy of the cerebral veins and microvascular temporary occlusion models. In the area of cerebrovascular research, we are studying several subjects, including management of giant cerebral aneurysms and temporary occlusion times and prevention and drug management of cerebral ischemia. Stroke, cerebral vasospasm, cerebral revascularization and management of complex vascular and neoplastic lesions with skull base techniques are being investigated by clinical and basic science approaches. Our pediatric neurosurgeons are researching the neuroendocrine response to hydrocephalus, and actively studying management of craniofacial abnormalities and complex pediatric tumors. Wayne State University neurosurgeons are exploring computer-assisted resection of brain tumors and vascular lesions using virtual reality and telepresence neurosurgery. Our stereotactic scientists and engineers work with neurosurgeons in developing real-world and multimedia information systems.

Our Neurotrauma Institute research focuses on head injury and spinal cord injury. Wayne State University is one of 10 national centers investigating drug therapies to prevent head injury from worsening. We also have a fully functional lab investigating the biomechanics of spinal cord injury and spinal instrumentation. The neurosurgery physiology labs are investigating electromyography to evaluate low back pain, electroencephalography analysis of transient global ischemia and brain electrical activity mapping.



Residency Education

Our academic mission, the quest for greater knowledge, is the foundation of our future and is dedicated to the patients we are committed to serve. This commitment to excellence involves a constant struggle for knowledge, expert clinical skills and critical thinking abilities. Through our association with Wayne State University, the Neurological Surgery Department directs the graduate neurosurgical residency education program, fully accredited by the American Board of Neurological Surgery. The neurosurgery residency is a seven-year program involving rotations at Detroit Receiving Hospital, Harper Hospital and Children's Hospital of Michigan. This educational program incorporates 12 to 18 months for research, allowing each resident time to pursue individual research interests for doctoral studies. Therefore, every neurosurgery resident has the opportunity to obtain a Ph.D. which is funded by the Neurological Surgery Department.

Neurosurgery residents at Wayne State University are exposed to a truly remarkable variety of clinical experiences through our neurosurgical clinics, operating suites and trauma services. Wayne State University neurosurgeons perform more than 2,500 procedures each year. The residency program offers all rotations required by the American Board of Neurological Surgery, with further specialized service rotations. Wayne State University physicians and Ph.D.s compose the full-time faculty of the Neurological Surgery Department. The quality of our faculty-resident interactions is excellent. Residents are treated as peers who are still learning. Our residents become respected neurosurgeons prepared for any eventuality, honored to have completed their residency at Wayne State University.

Neuroscience Education

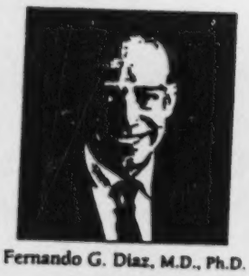
To complement our residency education program, the Neurological Surgery Department sponsors neuroscience seminars and courses for physicians, nurses, physician assistants and for our local citizens. We also sponsor community educational events locally through our commitment to "Think First," a national traumatic injury prevention program. Internationally, the Wayne State University Neurological Surgery Department works with the World Health Organization, as a member of the World Federation of Neurosurgery, developing neuroscience educational programs for people all over the world on topics such as stroke, trauma prevention and brain tumors.

Our Gurdjian lecture series brings world renowned neurosurgeons five times a year to Wayne State University for a two-day symposium to share knowledge and expertise with Detroit-area neurosurgeons. We offer periodic courses throughout each year on techniques in skull base surgery, stereotaxis and neurotrauma. Neurosurgery faculty, residents, nurses and physician assistants participate widely in educational conferences both nationally and internationally, always seeking knowledge to better provide the best clinical expertise to our patients.

WAYNE STATE UNIVERSITY
NEUROLOGICAL SURGERY DEPARTMENT

Patricia Anne Aronin, M.S., M.D.

Alexa I. Canady, M.D.


Fernando G. Diaz, M.D., Ph.D.

Murali Guthikonda, M.D.

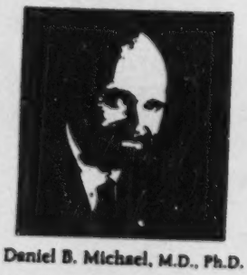
Steven D. Ham, D.O.

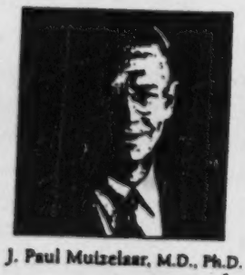
Robert En Ming Ho, M.D.

Robert R. Johnson II, M.D.

Paul K. King, M.D.

Asad Mazhari, M.D.

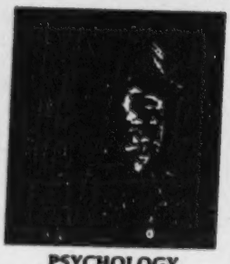

Daniel B. Michael, M.D., Ph.D.


J. Paul Muizelaar, M.D., Ph.D.

L. Murray Thomas, M.D.

Lucia Zamorano, M.D., Ph.D.

EDUCATION & DEVELOPMENT
Vicki M. Diaz, M.S.N., Ph.D.


PSYCHOLOGY
Patricia M. Moylan, Ph.D.

PSYCHOLOGY
Chiarina G. Owens, Ph.D.

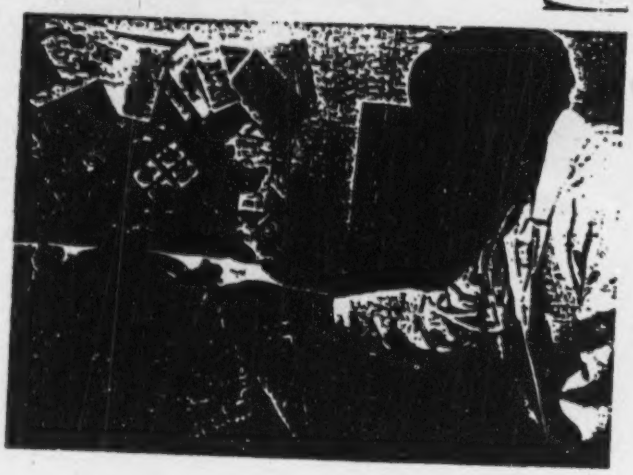
Physician Assistants:
George Domany, P.A.-C.
Marty Sedano, P.A.-C.

Stereotactic Support:
Charlie Z. W. Jiang, M.S.
Majeed Kadi, M.S.

Program Director:
Christine T. Bassett

Neuroscience Nurses:
Linda Bolam, R.N., M.S.
Barbara A. Gaudy, R.N., M.S.N.
Vickie L. Gordon, R.N., M.S.N.
Toni Green, R.N.
Nancy Greninger, R.N.
Michelle Lacey-Taglioli, R.N., B.S.N.,C.N.R.N.
Pauline A. LesCarneis, R.N., M.S.N.
Christine K. O'Connor, R.N., B.S.N.
Audette Palmer, R.N., B.S.N., M.H.S.A.
Frances K. Patton, R.N., M.S., C.C.R.N.
Mary Smellie-Decker, R.N., M.S.N.
Sandra L. Swope, R.N., B.S.

BIOMECHANICS RESEARCH
Hun K. Park, M.D., Ph.D.

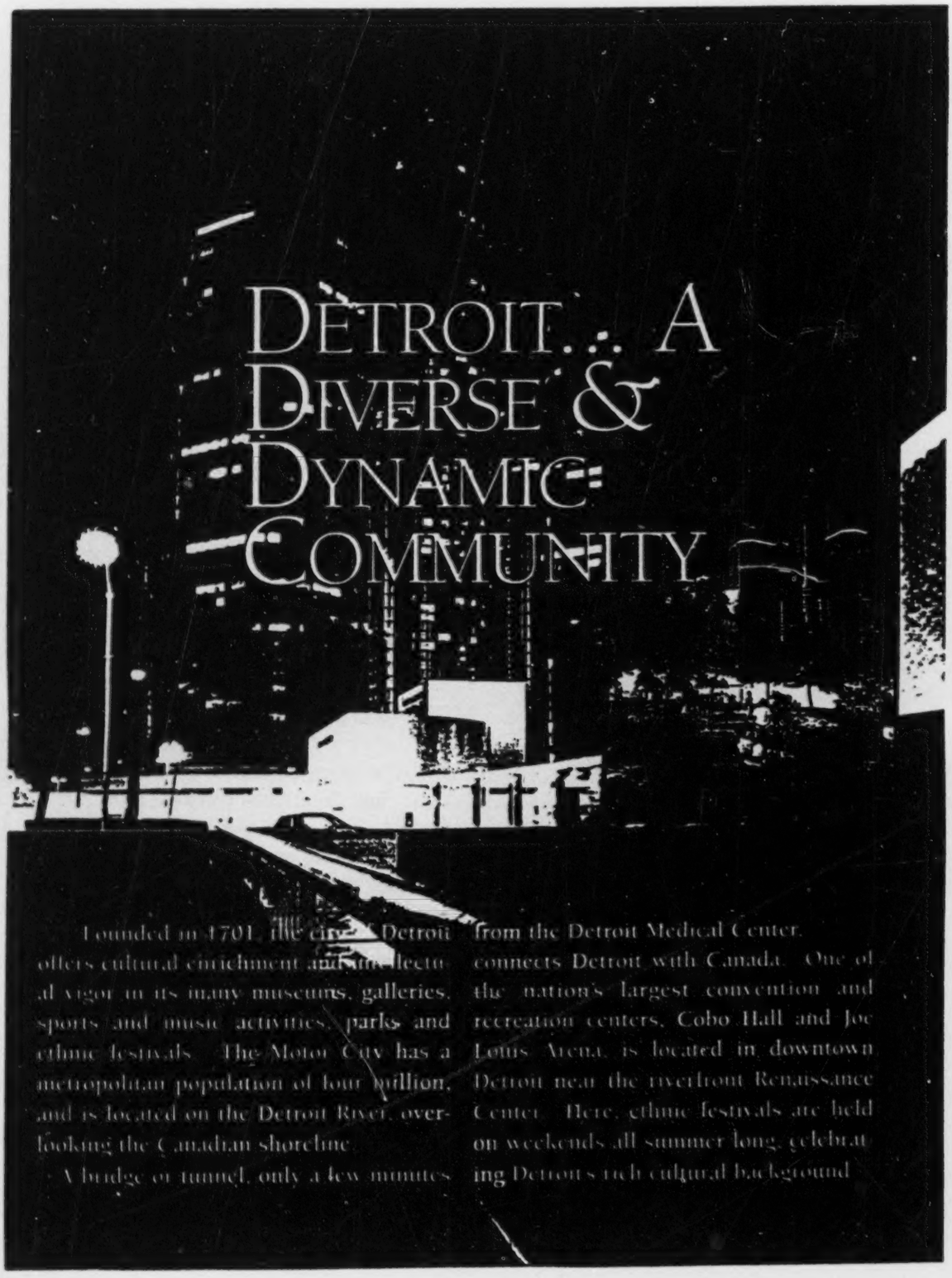


Subspecialty Neurosurgical Fellowships

The Neurological Surgery Department offers training programs in several neurosurgical subspecialties. Each fellowship offers significant research opportunities in both clinical and basic science areas. Our fellows, through subspecialty training at Wayne State University, are prepared to be intellectually and clinically competitive in the practice of his or her subspecialty or in the pursuit of an academic career. Several fellowships are offered each year in the areas of cerebrovascular, spine, skull base, stereotactic and pediatric neurosurgery.

Neuroscience Nursing and Physician Assistants

The Neurological Surgery Department recognizes the contributions of nurses and physician assistants to the care and treatment of our patients with neurosurgical disorders. Our nurses and physician assistants not only provide clinical and surgical support, but also are involved in a variety of neuroscience educational programs and research projects such as neuro-oncology, cerebrovascular diseases, pediatric neurosurgical problems and neurotrauma. The neuroscience clinical nurse specialists of the Wayne State University Neurological Surgery Department are educationally prepared with master's degrees in nursing. Our physician assistants are all certified by the National Council of Physician Assistants, with extensive experience in the neurosciences.



DETROIT... A DIVERSE & DYNAMIC COMMUNITY

Founded in 1701, the city of Detroit offers cultural enrichment and intellectual vigor in its many museums, galleries, sports and music activities, parks and ethnic festivals. The Motor City has a metropolitan population of four million, and is located on the Detroit River, overlooking the Canadian shoreline.

A bridge or tunnel, only a few minutes from the Detroit Medical Center, connects Detroit with Canada. One of the nation's largest convention and recreation centers, Cobo Hall and Joe Louis Arena, is located in downtown Detroit near the riverfront Renaissance Center. Here, ethnic festivals are held on weekends all summer long, celebrating Detroit's rich cultural background.

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Detroit is a sports lovers paradise with professional sports teams in basketball (Pistons), football (Lions), baseball (Tigers), hockey (Red Wings) and soccer (Neon). There are a great number of public and private sports facilities in the Detroit area. For winter sports enthusiasts there is skiing, ice skating and snowmobiling. In the summer months, Detroiters enjoy swimming, fishing, boating, jet and water skiing in Michigan's 3,250 miles of Great Lakes shoreline, 36,350 miles of inland streams and more than 15,800 lakes.

Detroit claims a unique musical history as the "birthplace of the Motown sound." The Michigan Opera Theatre, one of 10 major opus companies in the country, lives in harmony with the great variety of musical tastes found in Detroit. Orchestra Hall, just down the street from Harper Hospital, is the home of the Detroit Symphony Orchestra. Jazz lovers will enjoy the Montreux-Detroit Jazz Festival, as will country music lovers the Motown Hoedown.

Bicycling on Belle Isle, within a. short distance of the Detroit Medical Center, is a favorite pastime for Detroiters. Belle Isle is the city's 1,000-acre park on the Detroit River, and home to the Detroit Grand Prix and thunderfest boat racing. A children's zoo, nature paths, botanical gardens and conservatory bring Detroiters out to Belle Isle to enjoy the beautiful environmental setting. The nearby Detroit Zoo, one of the nation's largest and most complete zoological parks, showcases animals roaming freely in natural settings.

The spirit of America is captured and preserved at Greenfield Village and Henry Ford Museum, where three centuries of American life are authentically recreated. This extensive collection of Americana is nestled in a tranquil and colonial setting of more than 260 acres, housing historical homes and buildings from all over the country. Detroit is

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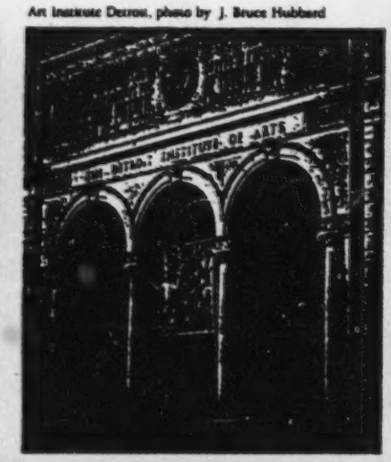
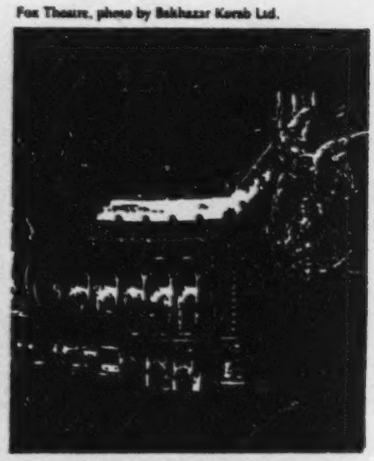
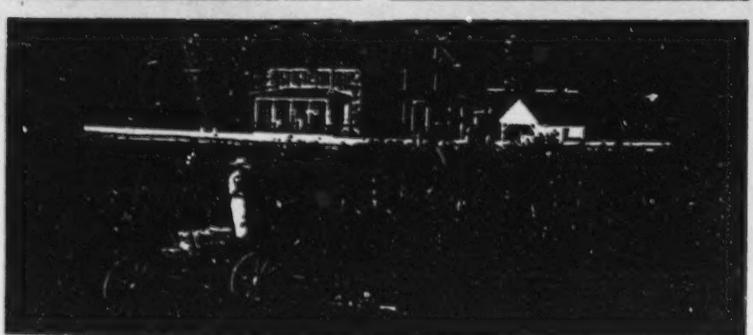
Detroit Pistons, Metropolitan Detroit Convention & Visitors Bureau

Art Institute Detroit, photo by J. Bruce Hubbard



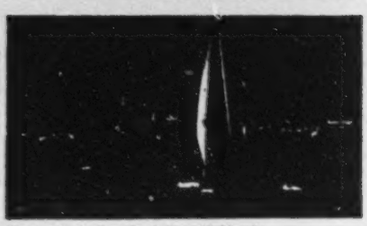
Fox Theatre, photo by Bakhazar Korab Ltd.





Firestone Farm, Courtesy of Henry Ford Museum & Greenfield Village

The spirit of America is captured and preserved at Greenfield Village and Henry Ford Museum, where three centuries of American life are authentically recreated. This extensive collection of Americana is nestled in a tranquil and colonial setting of more than 260 acres, housing historical homes and buildings from all over the country. Detroit is home to the Henry Ford family, and thus the car capital of the world. The museum showcases the Ford invention and traces its development throughout the years.



Detroit River, photo by J. Bruce Hubbard

Detroit's Cultural Center includes the Detroit Institute of Arts, one of the largest art museums in the country, the Detroit Science Center, the African-American Museum, the Motown Museum and the International Institute. All these museums, along with the Detroit Public Library, are located adjacent to Wayne State University and the Detroit Medical Center.

CARE MORE THAN OTHERS THINK IS WISE,

RISK MORE THAN OTHERS THINK IS SAFE,

DREAM MORE THAN OTHERS THINK IS PRACTICAL,

EXPECT MORE THAN OTHERS THINK IS POSSIBLE.

FOR MORE INFORMATION, CONTACT:
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Wayne State University
DMC The Detroit Medical Center

Wayne State University
School of Medicine

Wayne State University
School of Medicine

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University Health Center
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Detroit, Michigan 48201
(313) 745-4661 (FAX) 745-4099

EXHIBIT 13

177a

MEMORANDUM

DATE: August 4, 1994

TO: Dr. Mazhari

FROM: Vicki Diaz, 6E UHC, 745-4661

RE: Neurosurgery brochure

I am currently in the process of developing a brochure about our neurosurgery department that will be used as a recruiting brochure for physicians and residents, and as an informational brochure for referring physicians and future patients. This brochure will cover all areas of subspeciality in neurosurgery, our hospitals, residency and fellowship education, neuroscience physician assistants and nurses, our research program, and the Detroit community.

Please write your name below as you would like it printed in the brochure, along with your credentials. Also, if you are involved in a research project or study, I would like to have a brief description or title of the study. The brochure is scheduled for printing the last week of September, therefore I need your information as soon as possible. Thank you for your assistance.

Your name as you use it professionally, for example: John G. Smythe, R.N., B.S.N., C.N.R.N.
R. J. Smythe III, M.D., Ph.D.

NAME _____

RESEARCH _____

RECEIVED
AUG 11 1994